

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1188

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1188

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

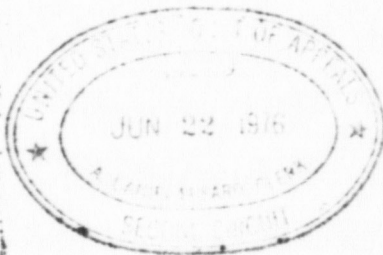
v.

BENJAMIN RODRIGUEZ,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

APPENDIX FOR APPELLANT



ALBERT J. KRIEGER
745 Fifth Avenue
New York, New York 10022

JOSEPH BEELER
2829 Bird Avenue
Coconut Grove
Miami, Florida 33133

Attorneys for
Defendant-Appellant

PAGINATION AS IN ORIGINAL COPY

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
-31-75	Pre trial conference held. Defts. atty. Albert Krieger notified but did not appear. Another conference is to be scheduled.	Carter, J.	
1-21-75	Filed order--ORDERED that the deft. appear in the office of the US Atty. by Dec. 3, 1975 to provide handwriting examples. Carter, J. m/n		
22-75	Pld Deft's Notice of Motion for an order req. the Govt to supply the deft the names and addresses of Govt's witnesses....etc....ret 1-23-76...at 10A.		
27-75	Pld affdvt of John N. Bush, A.U.S. Atty. in response to Deft's discovery motion.		
30-75	Pld MEMO ENDORSEMENT on Deft's notice of Motion for an order req. the Govt to supply the Deft the names & addresses of Govt's witnesses. ect. filed 1-22-76. Motion GRANTED in part and DENIED in part as reflected in the minutes of the hearing held 01-27-76. SO ORDERED---CARTER, J. (m/n)		
1-19-76	Filed brown envelope of EXHIBIT 1 sealed by order of the Court and to be placed in the vault.---CARTER, J.		
1-23-76	Filed Deft's Memorandum of Law, Statement of Fact.		
1-23-76	Filed Gov't affdvt of John N. Bush, AUSA, to call the Courts attention to certain of the material which the Government intends to turn over to defense counsel with respect to one of its major witnesses.		
2-03-76	Filed Govt Pretrial Memorandum.		
04-76	Deft & (Attys Albert J. Krieger & Gilbert Epstein present). Jury trial begun and cont'd.		
05-76	Trial Continued.		
09-76	Trial adjourned to 02-10-76 because of a juror being ill.		
10-76	Trial Continued.		
11-76	Trial continued.		
12-76	Trial Continued.		
17-76	Trial Continued.		
18-76	Trial Continued.		
19-76	Trial Continued.		
23-76	Trial Continued.		
24-76	Trial Continued.		
25-76	Trial Continued.		
26-76	Trial Continued.		
01-76	Trial Continued.		
02-76	Trial Continued & concluded. Jury Verdict, Deft GUILTY on COUNTS 1 & 2. P.S.I. ordered. Sentence adj to 04-05-76 at 9:30AM in Courtroom 312. Deft cont'd R.O.R....CARTER, J.		

DATE	PROCEEDINGS
3-23-76	FILED: 1976 MAR 23 PM 4:13 U.S. DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK CLERK: J. J. GARRITY, JR. 1976 MAR 23 PM 4:13
4-5-76	Filed Gov't Sentencing Memorandum.
4-5-76	Filed Judgment & Commitment Order. The Deft is hereby committed to the custody of the Atty General for imprisonment for a period of TWO (2) YEARS, on COUNT #1. There will be no sentence on COUNT #2, since it is a lesser offense under COUNT #1. Bail Pending appeal if fixed at \$25,000 dollars Cash or Surety bond.....GARRITY, J.
4-7-76	Filed Def't's Secured Personal Re: on license bond Pending Appeal in the amount of \$25,000.00 on condition that mother's bank passbook be surrendered to U.S. Atty., co-signed by Def't's mother and acknowledged by the clerk 4-7-76.
4-9-76	Filed Def't's Notice of Appeal to the U.S.C.A. for the 2nd Circuit from the verdict of conviction entered by the U.S.D.C. for the S.D. on 4-5-76. (Mailed copied to Def't's Atty & one in AUSA's bag). 4-12-76.
4-9-76	Filed Consent Order. Ordered that the bail limits be and they hereby are extended to enable Def't to travel to the State of California, and it is further ordered, that Def't shall return to the S.D. of NY on 4-14-76. SO ORDERED.....LACROIX, J.

BL, Jr.:slc
n-156

RLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 CRIM. 421

UNITED STATES OF AMERICA,

- v -

BENJAMIN RODRIGUEZ, a/k/a
"Bennie One-Eye",

Defendant.

INDICTMENT

74 Cr.

MICROFILM

OCT 3 1974

COUNT ONE

The Grand Jury charges:

Commencing on or about the 1st day of January, 1967 and continuing thereafter up to and including the 15th day of April, 1968, in the Southern District of New York, BENJAMIN RODRIGUEZ, a/k/a "Bennie One-Eye", did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing to the United States of America by him by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income, and by preparing and causing to be prepared, signing and causing to be signed, and by mailing and causing to be mailed a false and fraudulent income tax return for 1967 which was filed with the Internal Revenue Service, wherein it was stated that his taxable income was the sum of \$3,260 and that the amount of income tax due and owing thereon was the sum of \$494.20, whereas, as he then and there well knew, his taxable income for the said calendar year and taxes due thereon were substantially greater than the amounts stated in that he had had received income on which income tax was due and owing to the United States of America by him from the purchase and sale of heroin.

(Title 26, United States Code, Section 7201.)

COUNT TWO

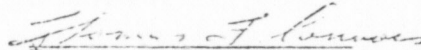
The Grand Jury further charges:

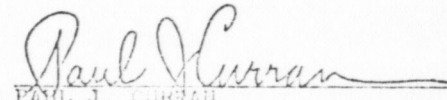
On or about the 15th day of April, 1968, in the Southern District of New York, BENJAMIN RODRIGUEZ, a/k/a



"Bennie One-Eye", the defendant, unlawfully, wilfully and knowingly did make and subscribe, and cause to be made and subscribed, a United States individual income tax return for 1967 which was verified by a written declaration that it was made under the penalties of perjury, which he did not believe to be true and correct as to every material matter, in that in the said individual income tax return the only reported sources of income was (a) the business of consultant, from which the amount of his income was \$5,200, and (b) the receipt of mortgage interest, in the amount of \$1,760, whereas as he then and there well knew and believed, he had additional income derived from another business, to wit, trafficking in heroin in the Southern District of New York.

(Title 26, United States Code, Section 7206(1).)


Foreman.


PAUL J. CURRAN
United States Attorney

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v.

74 Cr. 421

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BENJAMIN RODRIGUEZ

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March 1, 1976
10 a.m.

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THE COURT: Seat the jury.

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I don't know whether I have advise you, but I have managed to have sufficient copies of my charge made, and I am going to distribute them to the jury so that they can be able to follow and read it along while I'm delivering it.

You will have a copy of it as well.

(Jury present.)

THE CLERK: As the Court is about to charge the jury those spectators desiring to leave the courtroom may do so now. All others must remain seated during the course of the Court's charge.

CHARGE OF THE COURT

THE COURT: I had my charge Xeroxed and I am going to pass out a copy to each of you so that you can read it as I am delivering it.

They will be picked up after. You cannot take it into the jury room, but the hope is, and experience has demonstrated, that you absorb more of it this way.

Ladies and gentlemen:

We now come to that part of the case where the evidence is in, the lawyers have presented their arguments, and you are about to exercise your final role which is to pass upon and to decide the fact issues in the case. You are the sole and exclusive judge of the facts. You pass upon the weight of the evidence. You determine the credibility of witnesses. You resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may be warranted by the testimony or exhibits in the case.

Under your oath as jurors you are duty bound to approach your duties in an attitude of complete fairness and complete impartiality. You are to consider only the evidence heard in this courtroom. You are to appraise that evidence with calm deliberation.

My function at this point is to instruct you as to the law that is applicable to the case. It is your duty to accept the law as I state it to you in these instructions and to apply it to the facts as you find them. The logical result of that application is the verdict in the case.

I have permitted each of you to take notes during the course of this trial. I expect you to use whatever notes you took merely as your memory aids. They

1 should not be allowed to take precedence over your indepen-
2 dent memory of the facts. Moreover, merely because a
3 fellow juror may have memorialized in his or her notes
4 something contrary to your recollection is not to be taken
5 by you to mean that your memory is in error. It is your own
6 recollection of the facts and yours alone, which is control-
7 ling.
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9 At times throughout this trial I have been
10 called upon to make rulings upon various matters of law,
11 as for example when a question put to a witness was objected
12 to, or after a question was answered a motion was made to
13 strike the answer, or the offer of a document was objected
14 to.

15 I have sustained some objections and I have
16 overruled others. I have received and rejected exhibits
17 that were offered. It is essential in the performance of
18 your duty that when anything was ordered stricken from
19 the record or rejected that you put it out of your mind and
20 disregard it entirely. Similarly, if a question was asked
21 and an objection to that question was sustained and no answer
22 was given, the question itself should play no part in your
23 consideration of the case. Please do not concern yourselves
24 at all with my reasons for any of these rulings. These are
25 purely legal matters, and of no concern to you.

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2 Conferences at the bench were conducted at the
3 request of the attorneys. As I have advised you, these
4 conferences were solely on questions of law and are of no
5 concern to you. You are not to draw any inferences against
6 either side because of requests for such conferences or
7 because such requests were denied.

8 With respect to any fact matter, it is your
9 recollection and yours alone that governs. Anything that
10 counsel, either for the government or for the defense may
11 have said with respect to matters in evidence during the
12 trial, in a question, in colloquy with the Court, in argu-
13 ment, or in summation, is not to be substituted for your
14 own recollection of the evidence.

15 So, too, anything the Court may have said
16 during the trial, or may refer to during the course of these
17 instructions, as to any factual matter in evidence, is not to
18 be taken in lieu of your own recollection. The case must
19 be decided by you upon the sworn testimony of the witnesses,
20 and such exhibits as were received in evidence and any
21 stipulation entered into among counsel.
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Now, while you are duty bound to consider the evidence in this case as just defined, in your consideration of the evidence it is the sum of all the evidence on which your determination must rest and in that determination you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified in light of your own experience.

It is your function to determine the truth or falsity of the testimony of each witness. No inference as to the credibility of any witness should be drawn from the fact that upon occasion I have asked questions of a witness. My questions were only intended for clarification or to expedite matters. They were not intended to suggest any opinion as to the credibility of a witness who appeared before you.

Now how do you determine the truth and how do you appraise the credibility of the witness? Well, simply put, you use your own plain, every day common sense.

The degree of credit to be given a witness should be determined by his or her demeanor here, his or her relationship to the controversy and to the parties, his or her bias or impartiality, the reasonableness of his statements, the strength or weakness of his recollection

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2 viewed in light of all other testimony and the attendant
3 circumstances in the case.

4 You observed the witnesses. You heard their
5 testimony. How did they strike you? Did their answers
6 seem frank, open, truthful, candid? Or were they
7 equivocal, deliberately confusing, or evasive? Or were
8 they somewhere in between? How did each witness impress
9 you? So you take each one, and on the basis of your
10 common sense and your every day experience you determine
11 whether or not you believe the witnesses and to what extent
12 you believe them.

13 In passing upon the credibility of a witness,
14 you may also take into account whether there were material
15 inconsistencies or contradictions within his or her own
16 testimony; whether a witness changed his or her testimony;
17 the extent to which he or she has been corroborated or
18 contradicted by other credible evidence.

19 The testimony of a witness may fail to conform
20 to the facts as they occurred because the witness is
21 intentionally telling a falsehood, or because the witness
22 did not accurately observe the events about which he
23 testified, or because his recollection of what happened
24 is at fault, or even because he has not expressed himself
25 clearly in giving his testimony.

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2 If in your consideration of the evidence there
3 appear to be different versions of the facts, you will
4 have to determine whether the apparent discrepancy in the
5 evidence results from an understandable error which can
6 be reconciled so that the two stories fall together
7 rationally. If, however, you find this not to be
8 appropriate or possible, you will then have to decide which
9 version you will accept. You may accept so much of the
10 testimony of a witness as you may deem true, and disregard
11 the rest.

12 If you find that any witness has wilfully
13 testified falsely to any material fact, you may disregard
14 all his testimony or accept such part of it as you believe
15 worthy of belief as it appeals to your reason or judgment.
16 You are at liberty, if you deem it appropriate, to
17 disbelieve testimony in whole or in part, even though it is
18 not otherwise contradicted or impeached.

19 Evidence of conviction in the past of certain
20 crimes may be considered by you in determining that
21 witness's worthiness of belief. You may consider whether
22 the witness is a disinterested one or whether he is
23 fostering some interest of his own in giving testimony.

24 An interested witness is not necessarily
25 unworthy of belief. The interest of a witness in the

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outcome of this lawsuit is a factor, however, which you
may consider in determining the weight and credibility to
be given to that witness's testimony. It should be
remembered that the testimony of agents of the government
are not to be entitled to any greater or lesser weight than
any witness who is not an agent of the government.

(Continued on next page.)

2 Admissions of the defendant are among the most
3 effectual proofs in the law, and constitute the strongest
4 evidence against the party making it that can be given
5 of the facts stated in the admission. Accordingly, you
6 are entitled to give great weight to the defendant's
7 admissions in this case. But, as with all the evidence,
8 it is for you to determine what weight to give to the
9 admissions.

10 The government called as a witness Claude
11 Pastou who, if his testimony is to be accepted, was an
12 accomplice in the narcotics trafficking which the government
13 alleges the defendant participated in in 1967.

14 In the prosecution of crime the government is
15 frequently called upon to use witnesses who are accomplices.
16 Often it has no choice. The government must rely upon
17 witnesses of transactions, such as they are.

18 There is no requirement in the federal courts
19 that the testimony of an accomplice be corroborated.
20 The government contends that Pastou's testimony is
21 corroborated by other evidence with respect to several key
22 portions of his testimony. However, even without such
23 corroboration, conviction may rest upon the testimony
24 of an accomplice, if you believe it and find it credible.
25 It does not follow that because a person has acknowledged

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participated in some criminal acts that he is incapable of giving a true version of what he testified to in the case on trial.

His testimony, however, should be viewed with caution and scrutinized with care. The fact that a witness is an accomplice may be considered by you as bearing on his credibility. Was his testimony inspired by any motive of reward, of self interest or hostility to the defendant so that he gave false or colored testimony against him in this court before you? If you find that it was, you ought unhesitatingly to reject it.

However, after a cautious and careful examination of the accomplice's testimony and his demeanor upon the witness stand, if you are satisfied that he told the truth here as to certain events, there is no reason why you should not accept it as credible and act upon it accordingly.

A witness may be discredited by contradictory evidence, or by evidence -hat at other times the witness has made statements which are inconsistent with his or her testimony here. If you believe that any witness has been discredited in this manner, you may give the testimony of that witness whatever credibility, if any, you think it deserves.

The fact that the Government is a party here --

1 that the prosecution is brought in the name of the United
2 States of America -- entitles it to no greater consider-
3 ation than that accorded to any other party to litigation.
4 By the same token, it is entitled to no less consideration.
5

6 This case should be considered and decided
7 by you as an action between persons of equal standing in
8 the community. All persons stand equal before the
9 law and are to be dealt with as equals in a court of
10 justice.

11 During the course of this trial you have heard
12 evidence that certain witnesses made statements under
13 oath which were inconsistent with their sworn testimony
14 here before you. I have previously instructed you, and
15 I now wish to instruct you again as to how you may consider
16 those earlier statements. If when confronted with the
17 earlier statements the witness affirmed the truth of the
18 earlier statement, you may consider the statement for the
19 truth of what it says, just as you may consider the trial
20 testimony.

21 As to any witness who denied the truth of the
22 earlier statement, you may consider the statement only
23 as it affects the witness' credibility, with one exception.
24 If the earlier inconsistent statement was made under oath
25 before a grand jury, you may consider the truth or falsity

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of its content, even though the witness has not affirmed its truth.

Certain of the witnesses called in this case have been identified to you as expert witnesses. The law permits such an expert witness to testify in the form of an opinion, and the opinions stated by these experts are based on particular facts as the expert himself has observed them or, as the attorney who questioned him has asked him to answer.

However, the expert is subject to the same rules of credibility as any other witness. You may reject his opinion if you find the facts different than he assumed or if you find his testimony unconvincing, and you may accept or reject the testimony as you would the testimony of any other witness. The opinions of the experts must be considered by you, but are not controlling in reaching your judgment. In short, you may give the expert testimony such weight as you feel it deserves. The determination in this case rests with you, not with the experts.

In deciding this case you will be called upon to consider both direct evidence and circumstantial evidence. I would like to explain the difference between these two types of evidence.

Direct evidence is where a witness or a

2 participant testified to what he saw, heard or observed,
3 what he knows of his own knowledge, something which comes
4 to him by virtue of his senses. A document can also
5 contain direct evidence.

6 Circumstantial evidence is evidence of facts
7 and circumstances from which one may infer connected
8 facts which reasonably flow in the common experience of
9 mankind. Stated somewhat differently, circumstantial
10 evidence is evidence of facts from which other facts that
11 are material in the lawsuit may be found by a process of
12 inference.

13 Let me give you an example that I believe has
14 nothing to do with the facts in this case.

15 Suppose you had a material issue in some case
16 as to whether John Doe was drinking alcoholic beverages
17 on some particular night. A witness might take the stand
18 and testify that he had given whiskey to John Doe and had
19 seen him drinking it. That would be what is termed
20 direct evidence. If you believed the witness and thought
21 he was able to report accurately, you could find from
22 that direct evidence that John Doe had been drinking on
23 the night in question.

24 On the other hand, you might have a witness
25 testify that he had seen John Doe enter a tavern and then

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had seen him leave the tavern a few hours later, walaking and talking in ways that suggested he was drunk. If you believed that witness and thought he was an accurate reporter you could find on the basis of that testimony that John Doe had been drinking on the night in question. You would be using circumstantial evidence to find the existence of a material fact in that hypothetical case.

Let me tell you for your purposes that there is no general rule of law and no general rule of good sense that places either of these two types of evidence, direct or circumstantial, in a general way on any higher or lower or different footing from the other. With respect to any evidence admitted into a trial record, whether it is direct or circumstantial, it is entitled to such weight, and you are permitted to draw such reasonable inferences as your good judgment dictates in a particular case.

The weight and effect of any item or theory of evidence depend not on whether it is to be categorized as direct or circumstantial but on the concrete significance of that particular piece of evidence in its trial setting and upon its intrinsic credibility and persuasive power in the light of your observations of the witness, your own general experience of things and your reasonable

2 analysis of the whole record.

3 There are times when different inferences may
4 be drawn from facts, whether they are proved by direct
5 or circumstantial evidence. The government asks you to
6 draw one set of inferences, while the defendant asks you
7 to draw another. It is for you to decide, and for you
8 alone, what inferences you will draw.

9 From time to time throughout this trial
10 certain charts or other graphic illustrations have been
11 presented to you. I have previously instructed you,
12 and I now instruct you again that the presentation of such
13 graphic illustrations or other summaries of data prepared
14 by accountants or other witnesses in this case, were
15 received solely for the purpose of collecting and summariz-
16 ing facts disclosed by books, records, or other documents
17 which have been put into evidence. Such charts or other
18 summaries of data are not in and of themselves evidence
19 nor are they proof of any facts in this case. If such
20 charts or illustrations do not, in your view, correctly
21 reflect the underlying evidence which they purport to
22 summarize, you should disregard them. Put another way,
23 the charts are for use only as a matter of your convenience.
24 If you find that they are not a true statement of the
25 underlying evidence, they are unreliable for your purposes

1 since your determination must be based on your recollection
2 of the evidence.
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4 As I advised you at the start of this trial,
5 the indictment is merely an accusation, a charge. It is
6 not evidence or proof of a defendant's guilt and no
7 inference of any kind may be drawn from the indictment.

8 The Government has the burden of proving the
9 charges against the defendant beyond a reasonable doubt.
10 It is a burden that never shifts and remains upon the
11 Government throughout the entire trial. The defendant
12 does not have to prove his innocence. On the contrary,
13 he is presumed to be innocent of the accusation contained
14 in the indictment.

15 The presumption of innocence was in his favor
16 at the start of the trial, continued in his favor through-
17 out the trial, is in his favor even as I instruct you now.
18 It remains in his favor during the course of your deliber-
19 ations in the jury room.

20 It is removed only if and when you are
21 satisfied that the Government has sustained its burden
22 of proving the guilt of the defendant beyond a reasonable
23 doubt.

24 Now, what is a reasonable doubt? It is a
25 doubt based on reason, which arises from the evidence or

2 lack of evidence in the case. It is a doubt that a
3 reasonable man or woman might entertain. It is not a
4 fanciful or speculative doubt; it is not an imagined
5 doubt, it is not a doubt that a juror might conjure up in
6 order to avoid performing an unpleasant task or duty.
7 It is not proof to an absolute certainty. Let me repeat --
8 it is a reasonable doubt. It is a doubt that appeals
9 to your reason, to your judgment, your common understanding
10 and your common sense -- a doubt that would cause you to
11 hesitate to act in matters of importance in your daily
12 lives. On the other hand, the Government does not have
13 to prove the guilt of a defendant beyond all possible doubt
14 or to a positive certainty. If that were the rule, few
15 people however guilty they might be, would be convicted.
16 If, when you consider the evidence in this case, you have
17 a reasonable doubt that the Government has proved any
18 element of the crime charged, then you must return a
19 verdict of acquittal. You may not return a guilty
20 verdict simply because you feel that it is more likely than
21 not that the defendant committed the crime charged.
22 A guilty verdict is only appropriate if each and every
23 one of you is satisfied that the defendant's guilt has been
24 proved beyond a reasonable doubt.

25 The indictment in this case contains two counts.

Each of these counts charges a separate offense or crime.

It is your obligation to consider separately each of the individual charges, or counts of the indictment, and to decide whether, as to each count, the government has or has not sustained its burden of proving beyond a reasonable doubt the guilt of the defendant of the charge in that particular count.

Now, let me instruct you with respect to Count One. In substance, Count One charges that the defendant unlawfully, wilfully and knowingly attempted to evade the federal income tax due and owing from him and his wife for the year 1967. The first count of the indictment reads:

COUNT ONE

The Grand Jury charges:

Commencing on or about the 1st of January, 1967, and continuing thereafter up to and including the 15th day of April, 1968, in the Southern District of New York, Benjamin Rodriguez, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing to the United States of America by him by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income, and by preparing and causing

to be prepared, signing and causing to be signed, and by mailing and causing to be mailed a false and fraudulent income tax return for 1967 which was filed with the Internal Revenue Service, wherein it was stated that his taxable income was the sum of \$3,260 and that the amount of income tax due and owing thereon was the sum of \$494.20, whereas, as he then and there well knew, his taxable income for the said calendar year and taxes due thereon were substantially greater than the amount stated in that he had had received income on which income tax was due and owing to the United States of America by him from the purchase and sale of heroin.

We all know that our system of tax collection is an honor system. Each of us is required to disclose annually to the Internal Revenue Service our taxable income and based thereon the taxes due the government. In other words, under our system each taxpayer is his own tax assessor. Such system can function adequately only if the taxpayer files an accurate and honest return reflecting his income on which taxes are payable.

A preliminary word as to what this case is not about. It has nothing to do with the collection of any taxes that may be due to the government. This is a criminal case.

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2 Its object is to secure the enforcement of
3 criminal sanctions set up by Congress when it is charged
4 that one has willfully attempted to defeat or evade the
5 payment of taxes due or when it is charged that one has
6 knowingly subscribed to a false tax return. There is a
7 distinction between civil liability imposed upon a defendant
8 and criminal responsibility for his acts and conduct.

9 Therefore, we are not concerned with civil
10 liability -- whether or not taxes claimed to be due
11 have been paid or will be paid by the defendant.

12 This will not be determined by you in deciding
13 the fact issues in this case.

14 Count One of the indictment is based upon the
15 Internal Revenue laws -- in particular, section 7201 of
16 Title 26, which in pertinent part provides:

17 "Any person who willfully attempts in any
18 manner to evade or defeat any tax imposed by this
19 title or the payment thereof..." is guilty of a crime.

20 An attempt to evade income taxes for any one
21 year is a separate offense from an attempt to evade the tax
22 for any other year.

23 Basically the government contends that the
24 joint return for 1967 substantially understated taxable
25 income and that the defendant thereby evaded taxes which

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2 were due and owing to the United States.

3 The government's position is that the defendant
4 understated his income by failing to report, or failing to
5 cause to be reported, on the joint tax return for 1967,
6 monies which the government charges were received from the
7 alleged purchase and sale of heroin and that the defendant
8 thereby attempted to evade taxes that were due.

9 In order to find the defendant guilty of the
10 charge of income tax evasion made in Count One, you must
11 find that the government has proved, beyond a reasonable
12 doubt, the following three elements:

13 First, that the defendant received substantial
14 taxable income, in addition to that reported in the tax
15 return for the calendar year in question, upon which unreported
16 income, additional federal income tax was due and owing;

17 Second, that the defendant made an attempt to
18 evade or defeat the tax; and

19 Third, that the defendant made the attempt to
20 evade or defeat the tax knowingly and wilfully.

21 With respect to the first element -- the
22 receipt of substantial unreported taxable income -- the
23 government must prove that the defendant had taxable income
24 which the defendant failed to report on his tax return, and
25 that had he reported this income there would have been a

1 jklt 3

2 substantial tax due and owing to the United States for the
3 year 1967.

4 This may be proved by any practical method
5 available in the circumstances of a given situation,
6 including circumstantial, or direct evidence, or a
7 combination of both.

8 Recall that I have already defined for you
9 the meaning of direct and circumstantial evidence.

10 The government relies in this case on two
11 methods of proving the charge that the defendant evaded a
12 substantial amount of his income taxes for the year 1967.

13 First, it contends that the defendant made
14 great profits on the heroin that he allegedly sold in 1967,
15 which profits he failed to report on his tax returns for
16 that year. If you conclude beyond a reasonable doubt that
17 defendant trafficked in heroin in 1967, that he made substan-
18 tial profits from it, and that he realized these profits
19 during 1967, then, assuming you also find the other necessary
20 elements, you should find the defendant guilty of evading
21 his taxes.

22 Second, the government contends that defendant's
23 income tax evasion is also established by what is commonly
24 called the expenditures method, which was described by the
25 government's tax expert, Richard Osmer.

1 jklt 4

2 This expenditure technique assumes that the
3 expenditures in question were made by the taxpayer, or on
4 his behalf, by someone using the taxpayer's money.

5 The underlying concept of this method is that
6 if a taxpayer is engaged in an income-producing activity,
7 and if the taxpayer regularly makes expenditures -- such
8 expenditures, after eliminating therefrom any amounts which
9 are attributable to money earned in earlier years or to a
10 nontaxable source, such as loans, gifts or inheritances,
11 constitute evidence of taxable gross receipts under properly
12 determined conditions.

13 In other words, under this theory, if expendi-
14 tures, however made, in a given year are substantially over
15 and above reported income and all nontaxable items, an
16 inference is permitted, absent a satisfactory explanation,
17 that the unaccounted difference or balance is unreported
18 taxable income for the year in question.

19 In brief, if a man is engaged in an income-
20 producing activity and is regularly making expenditures for
21 his own purposes, this is proof that he has income, and if
22 the amount of the expenditures exceeds exemptions and
23 allowable deductions, the income is taxable.

24 However, proof of an excess of expenditures over
25 and above exemptions and nontaxable items by itself, is not

1 jklt 5

2 sufficient to establish taxable income during the period in
3 question.

4 Under this theory, more is required.

5 The government must establish that the claimed
6 excess of expenditures was made from funds realized as
7 income through income-producing activity; and to be
8 considered as evidence of taxable income, the expenditures
9 must be attributable to some current, rather than a past,
10 source of income.

11 The force of the government's case, when it
12 relies upon approximations and inferences to be drawn from
13 evidence submitted under the expenditure theory, depends
14 upon the government's effective negating of reasonable
15 explanations by the taxpayer as to nontaxable sources for
16 the expenditures for the years in question.

17 Thus, explanations or relevant leads may be
18 offered to the government by the taxpayer, or his attorney
19 or other agent, as to the source of his funds used for
20 deposits and cash expenditures in the years in question.

21 Such as cash on hand from prior years, or
22 the receipt of gifts, loans, inheritances, transfers between
23 accounts or other nontaxable items.

24 If these are reasonably susceptible of being
25 checked, the government must investigate into the truth of

1 jklt 6

2 the explanation.

3 Adequate investigation must be made by the
4 government agents in order to negative the likelihood that
5 such unexplained expenditures came from a nontaxable source.

6 On the other hand, when relevant leads are not
7 forthcoming, the government is not required to negate every
8 conceivable source of nontaxable funds.

9 The government's case in relying upon the expen-
10 diture theory is premised upon its claim that the defendant
11 was involved in narcotics transactions; in short, that the
12 unreported income in the years in question came from nar-
13 cotics trafficking.

14 You may consider each theory separately, or,
15 if you choose, you may treat the two theories as complemen-
16 tary -- for example, the government contends proof under
17 the expenditure theory corroborates its evidence of defen-
18 dant's narcotics trafficking -- and go about your delibera-
19 tions by using the two theories together.

20 Naturally, if you are convinced beyond a reason-
21 able doubt that the defendant evaded a substantial amount
22 of his income taxes for the year 1967 by using the two
23 theories together, and assuming you also find the other
24 necessary elements, you should find the defendant guilty of
25 the charge of tax evasion.

1 jklt 7

2 Now, to repeat a word of caution and an instruc-
3 tion that I gave you at the time this evidence was received:

4 First, as I then told you, and repeated several
5 times during the trial, even if you find that the defendant
6 was engaged in narcotics trafficking, we are not concerned
7 whether there was a violation of federal or state laws.

8 These are not to concern you or enter into your
9 deliberations.

10 The evidence was received for a very limited
11 purpose -- to permit the government to offer proof of an
12 alleged source of income.

13 I instruct you, as a matter of law, that income,
14 even if derived from illegal activities, constitutes taxable
15 income and must be reported.

16 Again, I repeat, the sole significance of such
17 evidence is whether or not narcotics trafficking provided a
18 source of substantial income to the defendant which he
19 omitted to report.

20 In sum, upon the totality of the evidence, the
21 government claims that it has taken into account all factors
22 which I have mentioned previously, and that the resulting sum
23 of the defendant's non-deductible expenditures for each
24 year represent a reasonable approximation of the defendant's
25 gross receipts for 1967; that after subtracting the

1 jklt 8

2 defendant's allowable business expenses, personal deductions
3 and exemptions, the result is a figure which fairly approxi-
4 mates the defendant's true taxable income for the year in
5 question.

6 The government's contention regarding the amount
7 of income reported, the amount allegedly unreported, the
8 taxes actually paid, and the amount of taxes allegedly due
9 on the unreported income are set forth in the testimony of
10 the tax experts of the Internal Revenue Service, who also
11 summarized their testimony on charts or schedules, in
12 evidence as Government Exhibits 1, 192, 193, 194, 195
13 and 196.

14 Is that correct?

15 MR. BUSH: That is correct, your Honor.

16 THE COURT: I have already instructed you that
17 those and related exhibits were received only as memory aids
18 and they are not evidence.

19 Your fact determination must be based only upon
20 the underlying exhibits in the case, the testimony of witnesses
21 and the totality of all the evidence.

22 Incidentally, the government does not have to
23 establish the exact amount of the unreported income or the
24 additional tax claimed to be due to a mathematical certainty.
25 It is sufficient if the proof establishes that a substantial

1 jklt 9

2 part of the tax liability was evaded.

3 There are no exact guidelines as to what is
4 a substantial amount of tax owing.

5 This varies in each individual case. This is a
6 matter for your determination and depends upon a comparison
7 of the unreported income to the reported income, and upon
8 the size of the tax that would be owing on the additional
9 income had it be reported.

10 (Continued on the next page.)

Take 3A a.m. 1

bslt 1

2 The second element of the crime of tax evasion
3 which you must find that the government has proved beyond a
4 reasonable doubt before you may find the defendant guilty of
5 the charges in Count One is that the defendant attempted to
6 evade or defeat the tax due in 1967.

7 The attempt may consist of the failure to report
8 the full income required by law.

9 Here, under the indictment, the defendant is
10 charged with the attempt to evade a large part of his tax
11 by preparing and causing to be prepared and filing a false
12 and fraudulent income tax return for 1967 by failing to
13 include in his return his full taxable income.

14 An attempt is made when a false return is
15 knowingly filed.

16 To sustain the charge that the defendant filed a
17 false and fraudulent tax return, the government must prove
18 that the defendant knew he had income in the year in ques-
19 tion which was taxable and which he was required by law to
20 report.

21 The government must also prove that the defen-
22 dant attempted to evade or defeat the tax on that amount, or
23 a substantial part of it, by knowingly and purposely failing
24 to state and report all of the income which he knew he had
25 during the calendar year, and which he knew it was his duty

1 bslt 2

2 to state and report in his return for the year in question.

3 The third element of the crime of tax evasion
4 which you must find in order to find the defendant guilty of
5 that offense is that the defendant's failure to report, or
6 cause to be reported, additional taxable income -- that is,
7 the defendant's attempt to evade or defeat the payment of
8 taxes, if you find there was such an attempt, was willful.

9 Thus, even if you should find the defendant's
10 income was understated in the returns, but that the govern-
11 ment has not proved beyond a reasonable doubt that he did so
12 willfully with an intent to evade taxes, you must acquit him.

13 The government must establish beyond a reason-
14 able doubt that the defendant acted with the specific intent
15 of concealing the true taxes known by him to be due.

16 Willful means that one does an act purposely
17 and with the specific intent to disregard the law, or to do
18 that which the law forbids.

19 Willfulness involves conscious wrongdoing, or,
20 as it has sometimes been stated, an evil state of mind -- a
21 criminal intent and purpose to violate the law -- in this
22 case, to cheat the government out of any part of taxes known
23 by the defendant to be due to it.

24 Thus, actual knowledge by the defendant that
25 the returns filed were false and subsequent filing in spite

bslt 3

of such knowledge, would show that the defendant was acting willfully.

On the other hand, willfully does not mean inadvertence, carelessness or honest misunderstanding of what the law requires. There is no willfulness in errors of law, mistakes of fact, or bad judgment.

In the context of this case, willfulness may be defined as the state of mind of a person who is fully aware of the existence of a tax obligation which he deliberately attempts to evade.

It is an issue you are called upon to decide.

Medical science has not yet devised an instrument which can record what was in one's mind in the past or then motivated him.

The state of a man's mind may be inferred from his words, his actions and his conduct. Thus, direct proof of willfulness is not required.

It would be a rare case where it could be shown that a taxpayer had knowledge of certain matters and stated that he was doing certain things with the specific object of defeating or evading the payment of his income tax.

Accordingly, the circumstantial evidence is usually relied upon.

As I have previously instructed you, circumstantial

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evidence under our law is as weighty as direct evidence.

Consideration of all the facts and circumstances established by the evidence, together with the exhibits, may permit a reasonable inference of willfulness.

The government contends that the evidence in this case points to the conclusion that the defendant acted willfully with the intention of evading and defeating personal income taxes and not carelessly or inadvertently.

Any conduct, the likely effect of which would be to mislead or conceal, is conduct from which a willful attempt to evade may be inferred.

Willful intent may be inferred from:

(1) covering up sources of income or covering up specific expenditures;

(2) the receipt of taxable income without disclosing this to one who prepared the taxpayer's return;

(3) the use of large sums of cash in the major portion of one's financial transactions;

(4) any conduct, the likely effect of which would be to mislead or conceal the true facts as to one's income.

While an individual is not liable for negligence or carelessness in filing an incorrect return, yet, if you find the returns were incorrect in that they failed to

bslt 5

include substantial taxable income, and further find the defendant was aware that the returns were incorrect because he failed to report or cause to be reported such additional substantial income, these are circumstances which you may consider in determining whether the defendant had willful intent to evade payment of taxes by filing false returns.

A taxpayer, of course, may delegate the responsibility for the preparation of his returns to a person whom he has reason to believe is competent to handle such matters. The mistakes of such a person are not attributable to the taxpayer.

However, the taxpayer is required to give or make available accurate information to the person preparing the return with respect to his income for the taxable year he engaged the preparer's services. He cannot blame or shift responsibility to the person he retains if he deliberately withholds from that person such vital information or takes positive action intentionally designed to mislead him.

If, on the other hand, you find beyond a reasonable doubt that the defendant, willfully and knowingly did not provide full and complete information to the preparer, Mr. Harold Hiltzik, or that he knew the return as prepared by Mr. Hiltzik, or that he knew the return as prepared by Mr. Hiltzik was not correct and substantially understated

bslt 6

the tax liability, then you are not required to acquit the defendant simply because he did not prepare the return himself, but rather had it prepared by another.

To sum up -- in considering Count One you must find beyond a reasonable doubt before you can convict the defendant:

(1) that there was a substantial amount of federal income tax due and owing from the taxpayer;

(2) that the defendant attempted to evade that tax; and

(3) that the defendant acted willfully.

If you do not find all these three elements beyond a reasonable doubt, then you must acquit the defendant on Count One.

On the other hand, if you find all the elements beyond a reasonable doubt as to the defendant on Count One, then you should return a verdict of guilty as to the defendant on that particular count.

Now, let me instruct you with respect to Count Two of the indictment:

In substance, Count Two charges that the defendant unlawfully, willfully and knowingly and under penalty of perjury signed a joint income tax return for the year 1967, knowing that this return was not correct in every

1 bslt 7

2 material respect.

3 Count Two of the indictment reads:

4 "The grand jury further charges:

5 "On or about the 15th day of April, 1968, in the
6 Southern District of New York, Benjamin Rodriguez, the
7 defendant, unlawfully, wilfully and knowingly did make and
8 subscribed, and cause to be made and subscribed, a United
9 States individual income tax return for 1967 which was
10 verified by a written declaration that it was made under
11 the penalties of perjury, which he did not believe to be
12 true and correct as to every material matter, in that in the
13 said individual income tax return the only reported sources
14 of income was (a) the business of consultant, from which
15 the amount of his income was \$5,200, and (b) the receipt of
16 mortgage interest, in the amount of \$1,760, whereas as he
17 then and there well knew and believed, he had additional
18 income derived from another business, to wit, trafficking
19 in heroin in the Southern District of New York."

20 Count Two charges a violation of Section 7206(1)
21 of the Internal Revenue Code, which is Title 26 of the
22 United States Code. That statute reads in pertinent part:

23 "Any person who willfully makes and subscribes
24 any return, statement or other document, which con-
25 tains or is verified by a written declaration that it

1 bslt 8

2 is made under the penalties of perjury, and which he
3 does not believe to be true and correct as to every
4 material matter, ... [commits a crime]."

5 In dealing with Section 7206(1) it is important
6 to remember that the section deals with false statements and
7 not with income tax evasion: Intent to evade taxes is not
8 an element of the crime charged. Rather, the section is
9 designed to insure that the Government is provided with
10 accurate and complete information on returns and statements.

11 For that reason, I also instruct you that it is
12 not an element of the offense that the government relied on
13 the alleged false statements.

14 In order to find the defendant guilty of the
15 offense charged in Count Two of the indictment -- that of
16 wilfully subscribing to a false joint tax return, the
17 government must establish beyond a reasonable doubt each of
18 the following four elements:

19 First: That the joint tax return in question
20 was made and subscribed, or signed, by the defendant;

21 Second: That the joint tax return in question
22 contained or was verified by a written declaration that it
23 was made under penalty of perjury;

24 Third: That the return in question was not
25 true and correct as to every material element; and

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Fourth: That in signing the return in question, the defendant acted wilfully, knowing that the return was not true and correct as to every material element contained in it.

(Continued on the next page.)

2 As to the first element, the joint tax return
3 on Form 1040 for the tax year ending December 31, 1967,
4 that return is in evidence as Government's Exhibit One.
5 You must find first of all that the defendant signed this
6 return.

7 The second element is that the joint tax return
8 for the year 1967, must be one that contains or is
9 verified by a written declaration that it was made under
10 penalty of perjury. There is no question that the tax
11 return here in evidence as Government's Exhibit One
12 contained or was verified by a written declaration that
13 it was under penalty of perjury. You still must make
14 this determination simply by looking at the return --
15 either it has such a statement or it does not.

16 The third element, which the government must
17 prove, beyond a reasonable doubt, before you may find
18 the defendant guilty of having wilfully signed a false joint
19 return as charged in Count Two of the indictment, is that
20 the return in question was false in some material respect.

21 By "material" I mean whether or not the items
22 alleged to be false were essential or useful to the
23 Internal Revenue Service in ascertaining the correctness
24 of the tax declared or in verifying or auditing the return
25 of the taxpayer.

With respect to Count Two, the government alleges that the return in issue was materially false in that it failed to include income received by the defendant from trafficking in heroin.

The Government does not have to prove the exact amount of the understatement, but it must prove beyond a reasonable doubt that the understatement of the receipts was substantial. If the understatement was insubstantial, or if there were none at all, so that the net income is generally accurate, then the understatement is not material. If the understatement of receipts is large and substantial so that the net income varies greatly from the true net income, then this is a false material matter.

If you find that there was an understatement of reported income, the substantiality of the understatement is an issue of fact which you must determine. I have already instructed you on how you determine substantiality with respect to the tax evasion charge in Count One. Those instructions are equally applicable here.

Finally, the fourth element which the government must prove beyond a reasonable doubt before you may find the defendant guilty of the charge in Count Two is that the defendant must have acted wilfully. In respect of Count Two, an act is wilful if it is done voluntarily

1 and deliberately with a specific intent to sign a return
2 as true and correct when the signer knows and believes
3 that the return is not true and correct, and when he does
4 this for the purpose of concealing from the government the
5 true income or other material facts that an accurate and
6 complete, truthful return would show.
7

8 The law requires that a person must act wilfully
9 so that no one will be convicted for innocent mistakes,
10 stupidity, carelessness or other innocent reasons. It is,
11 thus, not sufficient for the Government merely to prove
12 that the return was prepared in haste, recklessly, or that
13 the underlying records were kept in a careless or an
14 unwise manner.

15 Consider all the evidence, both direct, and
16 circumstantial, and decide whether the Government has proved
17 beyond a reasonable doubt that the defendant acted
18 wilfully.

19 In this regard, recall the instructions I have
20 previously given you regarding the element of wilfulness
21 with respect to Count One. These instructions are equally
22 applicable to your determination of wilfulness here.

23 If the defendant signed a return in good faith
24 and really believed that it was true, he has not committed
25 a crime and he should be acquitted; for in such a case

even if the return is not really true or correct, he is simply laboring under a mistake, and therefore would not be signing a return which he himself believed was not true. So, you see, the key question on this return is, what did the defendant himself believe as to whether the return was true or false?

You should also consider any other evidence or circumstances which you deem relevant to determine whether the defendant believed the return to be true and correct or whether he knew full well and believed that it was false.

To sum up, before you can convict the defendant on Count Two, you must find beyond a reasonable doubt, (1) that the defendant signed the return in question, (2) that the return contained or was verified by a written declaration that it was made under penalty of perjury; (3) that the return in question was not true and correct as to every material element, and (4) that in signing the return in question the defendant acted wilfully, knowing that the return was not true and correct as to every material element contained in it.

You have heard during the course of this trial testimony concerning Social Security payments required to be made by self-employed individuals who reside and work in Puerto Rico. This testimony concerned the years 1963

through 1967.

The law provides that a self-employed person living and working in Puerto Rico must have paid a self-employment tax for social security purposes during the years 1963 through 1967. Such taxes had to be paid quite apart from whether the individual had to file or did not have to file federal income tax returns for any or all of these same years.

Now, self-employment taxes had to be paid on all earnings derived from a trade or business carried on by a self-employed individual up to the sum of \$4,800 for the years 1963 through 1965. For the years 1966 and 1967, the upper limit was \$6,600. However, any income derived from the sale of property not held primarily for sale to customers in the ordinary course of the self-employed person's trade or business would not have to be reported.

As you recall, there has been testimony that the defendant did not file income tax returns in Puerto Rico for the tax years 1964 and 1965, and did not file federal returns for 1963 and 1965. If you find this to be a fact, two possible inferences may be drawn. First, you may infer, as the Government suggests, that the failure to file income tax returns during those years

2 is evidence of the lack of income during that period.

3 Alternatively, you may find that the defendant
4 did have income during the years 1963, 1964 and 1965
5 which he, nonetheless, failed to report. With respect
6 to this inference, I caution you that evidence that a
7 defendant may have committed an act at some other time
8 which is similar to the act here charged may not be
9 considered by you in determining whether the accused
10 committed any act now charged in the indictment before
11 you.

12 Nor may evidence of an alleged earlier similar
13 act be considered for any other purpose whatever, unless
14 you first find that the other evidence in the case, standing
15 alone, establishes beyond a reasonable doubt that the
16 accused did the particular act charged in the indictment
17 in this case.

18 However, if you do find, beyond a reasonable
19 doubt, based solely on evidence other than prior similar
20 acts, that the defendant you are considering did the acts
21 charged in the indictment in this case, then you may
22 consider evidence as to prior similar acts in determining
23 the state of mind or intent with which the accused did
24 the act charged here. That is to say, if prior similar
25 acts have been established by the Government then you may,

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but are not obliged to, draw the inference that, in doing the act charged in this case, the accused acted knowingly and intentionally, and not because of mistake or accident or other innocent reason.

As I told you before, the Government has the burden of proving the charges against the defendant beyond a reasonable doubt. A defendant does not have to prove his innocence. A defendant has the right to remain silent. He does not have to testify, or present any evidence in his behalf, and you may not draw any inference or conclusion or form any prejudice because a defendant did not testify or present evidence.

Now, under your oath as jurors you cannot allow a consideration of the punishment which may be inflicted upon the defendant, if he is convicted, to influence your verdict in any way or in any sense enter into your deliberation.

The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence, and the evidence alone, and you must not be influenced

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by any assumption, conjecture, or sympathy, or any inference not warranted by the facts.

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of acquittal. But on the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

I would like to point out that you should not enter the jury room with any preconceived pride of opinion. You should not be unwilling to be convinced by intelligent argument with your fellow jurors. Each juror has to answer to his or her own conscience, and each has to decide this case for himself or herself, but in so doing you should be willing to consider the views of the other jurors and to talk things out and try your best to reach a unanimous agreement.

Your verdict must be one with which each juror agrees.

If during your deliberations you deem it necessary to have a copy of the indictment, or desire any of the exhibits, they will be sent in to you on request. If you wish any portion of the testimony read or the Court's

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charge reread, that will be done.

In conclusion let me say: Every criminal case is important. It is important to the Government and it is important to the defendant. It is your obligation to decide the case on the evidence and on the law as I have charged it to you; I give the case to you with the assurance that you will just that-

(Continued on next page.)

1
2 Now, ladies and gentlemen, the procedure is
3 for me to confer with counsel and go over my charge, to
4 make sure that I didn't make a misstatement or to hear from
5 them; they may want me to make some change, and we will
6 do that, and when we come back I will give the case to
7 you.

8 All right.

9 (In the robing room.)

10 MR. KRIEGER: If the Court please, on page 10
11 of your charge you made reference to admissions of the
12 defendant. I would object to that portion of your
13 charge on the grounds that there are no admissions of the
14 defendant as to the commission of the crime charged in the
15 indictment.

16 THE COURT: Well, the admissions I referred to
17 are the statements that he allegedly made to the agent
18 about his being there to represent the interests of Raymond
19 Marquez.

20 MR. KRIEGER: I thought that was what the
21 Court had in mind, and I would consider them really state-
22 ments as against interest rather than as an admission in
23 the sense of being an admission of the -- again I repeat --
24 crime charged.

25 Certainly in 1963 he could not have made an

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admission of a crime which was to be committed in 1967.

THE COURT: Did I say admissions of the crime charged?

MR. KRIEGER: No, you did not, your Honor.

THE COURT: Where is that?

MR. KRIEGER: Page 10.

THE COURT: I don't know, I said admissions of various facts. I don't think anybody can infer that he admitted the crimes charged.

MR. KRIEGER: If the Court please, I would object to that portion of your charge dealing with --

THE COURT: What page is that?

MR. KRIEGER: Page 11 -- dealing with accomplices.

If your Honor please, I was under the impression that the word "accomplice" had been dropped out of this kind of charge and that the reference would be to a participant for fear that the jury may come to the conclusion that by the utilization of the word "accomplice" that the Court has made a finding that (a) the crime was committed and (b) that the crime was committed with the defendant participating and that the individual who was testifying was presumumptively an accomplice, as opposed to a participant in the crime.

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2 THE COURT: I think I have made that clear.
3 I must confess I had difficulty with making it acceptable,
4 but I have said here that Pastou's testimony, if it is to
5 be accepted, was that he was an accomplice in narcotics
6 trafficking in which the defendant participated.

7 I don't think there can be a misunderstanding
8 about that.

9 MR. KRIEGER: If the Court please, on page
10 14, dealing with inconsistent statements, in the second
11 paragraph you said that "If the earlier inconsistent
12 statement was made under oath before a grand jury," would
13 you insert the words "or at trial" because Pastou was
14 confronted with some prior sworn testimony before trial,
15 at trial, at the Casamento trial, for instance, the portions
16 of his testimony dealing with the amount of heroin that he
17 had brought into this country, by his own admission, during
18 the year 1967.

19 MR. BUSH: If the Court please, there may have
20 been some inconsistent testimony pointed out or attempted
21 to be pointed out to Mr. Pastou during the course of his
22 cross-examination. However, as I understand it, the
23 proper method of proceeding, if that is to be brought as
24 affirmative evidence to the jury, is to ask the Court for
25 an instruction at that point and ask that that testimony

1 be moved into admission, into evidence, and neither of
2 those things were done, and in light of that factor, it
3 seems to the Government that any further instruction on this
4 matter would be in error. Indeed, there were many incon-
5 sistencies pointed out by the Government in its cross-
6 examination of various defense witnesses apart from the
7 testimony that was actually affirmatively offered into
8 evidence.
9

10 THE COURT: The only testimony, I thought, about
11 that was the one of Bernardini.

12 MR. BUSH: Mr. Coll-Moya's testimony was also
13 offered into evidence.

14 MR. KRIEGER: I don't think any formal offer of
15 the specific point has to be made as Mr. Bush has indicated.

16 I think the rules provide otherwise.

17 THE COURT: All right.

18 MR. KRIEGER: I n. at jump up to page 26, accord-
19 ing to my notes.

20 If your Honor please, I respectfully except to
21 the portion of your charge on page 26 going up to "A prelim-
22 inary word as to what this case is not about."

23 I don't think that the honor system recitation
24 of tax collection has any place in this case, and I would
25 except to that.

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On page 29, if the Court please, rather than specifically accept to page 29, your Honor, I would like to make a series of exceptions to the whole discussion which begins upon page 29 and runs through, oh, I would say to about page 39.

(Continued on next page.)

Take 4B a.m. 1

jklt 1

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THE COURT: That's about the expenditures method?

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MR. KRIEGER: The expenditure method as opposed

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to the specific item method.

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The Court has heard our objections and excep-

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tions at length and I would incorporate them at this time

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as a specific exception to that portion of the charge.

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THE COURT: All right.

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MR. KRIEGER: Also, if the Court please, I would

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like to incorporate a couple of specific exceptions, as

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for instance on page 34, the phrase "absent a satisfactory

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explanation."

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Once again, your Honor, I feel that we are here

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in a kind of situation where a burden is being placed upon

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the defendant to come forward with evidence. There is a

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similar, I would make a similar argument on page 36, to the

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use of the phrase "reasonable explanations by the taxpayer."

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I covered my exception on page 39 by my brief

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statement.

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THE COURT: Okay.

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MR. KRIEGER: On page 54, if the Court please,

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when the Court is suggesting how wilfulness may be inferred,

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I would object to -- sub 3 -- "the use of large sums of

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cash," because of the peculiar nature -- "the use of large

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sums of cash" --

1 jklt 2

2 THE COURT: It is not on 54.

3 MR. KRIEGER: I don't think I mispaginated,
4 your Honor. But, in any event, it pertains to the portion
5 of your Honor's charge which may be captioned "Wilful
6 Intent May Be Inferred From," and I refer to the sub 3 there
7 concerning "the use of cash" because of the peculiar nature
8 of the case.

9 On page 72, and I hope the pagination is correct
10 where we deal with Social Security, if your Honor please, I
11 think the statements in regard to Social Security are
12 confusing and it really highlights the fact that this
13 evidence should not have been admitted before this trial
14 jury in the first place and I except to it.

15 THE COURT: Okay.

16 MR. KRIEGER: I similarly except, if the Court
17 please, to failure to file income tax returns in prior years.
18 I think that on top of the other objections made we wind up
19 in a situation where the jury is being asked to go in a
20 corner and not think of elephants.

21 I think also, that the charge as to prior simi-
22 lar acts is confusing in that it indicates the jury is not
23 to consider it until they have found a verdict of guilty.
24 And then, if that is the case, they don't have to consider
25 it at all.

1 jklt 3

2 If the Court please, would you give me one
3 moment to confer with Mr. Epstein?

4 THE COURT: Yes.

5 (Pause.)

6 MR. KRIEGER: I would further except, if the
7 Court please, to the instruction on page 15 that the opinions
8 of the experts must be considered by you but are not
9 controlling in reaching your judgment.

10 They can reject, I would respectfully suggest,
11 they can reject the expert's testimony out of hand.

12 I would respectfully request the Court to include
13 in its instructions concerning what inferences may be drawn
14 from facts on page 19 that if an inference consistent with
15 innocence or favorable to the defendant is drawn, that they
16 must acquit the defendant.

17 THE COURT: I really don't understand why you
18 gentlemen insist upon coming up to me with that all the
19 time when you know that's a rule of the Fifth Circuit and
20 not a rule of this Circuit. This Circuit has specifically
21 rejected that.

22 MR. KRIEGER: And then I think rejected their
23 rejection. I know in Hughes they rejected it and then I
24 thought they came back.

25 THE COURT: They specifically rejected it. That

1 jklt 4

2 is a Fifth Circuit rule. You would be all right if we were
3 down in New Orleans, but we are not.

4 MR. KRIEGER: Thank you, your Honor.

5 THE COURT: All right, gentlemen.

6 Apparently I still have a hearing, but what I
7 would like for you gentlemen to do, if they want an exhibit,
8 to agree on it. If they want testimony, to try to get it
9 together, and only involve me if you have a fight and can't
10 resolve it.

11 MR. BUSH: Does the Court have any problem is
12 we go back to our offices and tell the clerk how to reach
13 us in short notice?

14 THE COURT: I don't think so -- there is no
15 point in your sitting around -- if both sides are readily
16 available. The problem is I would think that both of you
17 ought to wait around for a little while, because they may
18 get saddled and I think they are going to start calling for
19 things.

20 Other than that, by all means. There is no
21 point in sticking around here.

22 (In open court.)

23 THE COURT: Well now, Miss O'Mara, Mr. Conti,
24 Mr. Ahmad, I want to thank you for your services and your
25 faithful attendance and your consideration. But now that

1 jklt 5

2 all the first twelve jurors are all here, I am going to
3 excuse you.

4 (Alternates excused.)

5 THE COURT: We are going to have set up in, I
6 guess, one of those rooms for your deliberations.

7 It isn't going to be completely serene because
8 there are no bathrooms in it. You will have to come out and
9 come around, and use that. But maybe what you might do, I
10 think the paint is dry, you may decide that you can live in
11 there, but I don't know.

12 In any event, you can meet in there where there
13 is no bathroom.

14 Swear the marshal, please.

15 (Marshal sworn.)

16 THE COURT: We have to get that room straightened
17 out, so wait in there until that is done.

18 (Jury retired to begin their deliberations
19 at 11:35 a.m.)

20 (A note was received from the jury at 11:45
21 a.m., and marked Court's Exhibit 1.)

22 (A note was received from the jury at 12:30 p.m.
23 and marked Court's Exhibit 2.)
24
25

Take 1A p.m.

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(In open court - jury not present.)

THE COURT: I have a note from the jury which is marked Court's Exhibit 3.

(Court's Exhibit 3 marked.)

THE COURT: "Please, may we have an answer to:

"Is it sufficient evidence of guilt that the defendant spent monies in 1967 in excess of reported income, regardless of the source of that income, presuming his net worth was as stated in 1966 statement of net worth, or did that income have to come from heroin trafficking?"

I think what they're asking me to do is just to make their factual determination.

MR. BUSH: If the Court please, I think it is clear from the charge that you advised the jury that the income need not come from the heroin source. That is my understanding of the law on that. Maybe I'm mistaken as to the intent of the Court's charge.

THE COURT: Well, the point is, it seems to me, that, as I understood the evidence that you presented, the purpose of that 1966 statement was to help bolster your claim that he had extra income and that it did come, in fact, from a heroin source, and the purpose of the defendant's evidence about the profit was that he had a source of income which was not taxable.

1 jklt

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2 I'm not really sure I understand what they're
3 talking about. I think I get what they mean, but it seems
4 to me that they are really asking me to answer a question
5 that they're supposed to decide.

6 MR. BUSH: If the Court might give me just a
7 minute:

8 If we could assume, your Honor, that they are
9 convinced beyond a reasonable doubt as to the validity of the
10 starting point and also as to the validity of the fact that
11 the defendant spent more than he reported, but that at least
12 some of the jurors are not convinced beyond a reasonable
13 doubt that the defendant engaged in narcotics traffic
14 transactions in 1967, the government would submit that that
15 would be adequate to sustain the income tax evasion charge.

16 Now, as I understand the expenditures theory,
17 the government should, although it perhaps need not, but
18 should provide a plausible source of income to explain why
19 expenditures exceeded an apparent reported income for that
20 particular year. But I'm not sure that that is an element
21 of the charge. So it would seem to me that the answer to
22 their question is "No, it need not, although the evidence
23 obviously concerned testimony, whether it be given credibly
24 or not, that that is the source for the income."

25 THE COURT: Mr. Krieger.

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2 MR. KRIEGER: If the Court please, I tend to
3 agree with the Court's analysis of the question, in that it
4 is an exceedingly difficult question to respond to, that
5 the Court may well be invading the fact-finding function of
6 the jury in responding.

7 THE COURT: Why? You mean they asked me a
8 question, I can't respond to it? Is that what you're telling
9 me?

10 MR. KRIEGER: I am saying that it is a very
11 difficult question to phrase a response to without invading
12 the fact-finding function of the jury.

13 I was really picking up from what you yourself
14 had stated, your Honor.

15 Your Honor, it does appear to me that this jury,
16 and I'm not going to take the luxury of trying to interpret
17 what they're doing in there, but the thrust of this ques-
18 tion is directed towards that area of the Court's charge
19 which begins on what I have listed as page 32, where the
20 Court advised the jury that the government basically has
21 two contentions, and I think that is the legal question which
22 is contained within Court's Exhibit 3, and it is my belief,
23 your Honor, that to go beyond the statement of your charge
24 as contained in page 32, et seq, may well be a course
25 fraught with all kinds of other legal problems.

The loose language of the question also brings

1 up as to whether the income itself in 1967 has to be taxable
2 income, and all the Puerto Rican problems percolate through
3 it.

4
5 Now, this may be just inartful draftsmanship
6 on the part of the person who phrased the question, but the
7 underlying thrust, I think, goes to the Government's two
8 contentions.

9 MR. BUSH: If the Court please, I would ask for
10 an instruction saying that if you are convinced as to the
11 validity of the starting point, then there need not be any
12 specific source proved to establish the source of the income,
13 although you must be convinced, under the expenditures method
14 as explained earlier in the Court's charge, that in fact
15 there was additional income not reported by the defendant.

16 I believe that that captures what the law on
17 the subject is. If the law were different, then, of course,
18 the government would always be confined to a specific
19 items type of case, as to proving that income came from a
20 specific source and in a specific amount.

21 THE COURT: Well, as I understand the government's
22 responsibility, it presents its theory as to where the money
23 came from, and its theory is that it came from heroin, as a
24 plausible theory, and no other answer.

25 But the point is that if the expenditures are

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2 shown to have been established, and they are satisfied with
3 the expenditures theory, then the inference is that it is
4 income that is taxable, absent some thing else, some other
5 showing. But my problem, quite frankly, with that, by stating
6 it that way, is that I have the impression that by putting
7 it that way I am practically directing a verdict.

8 MR. BUSH: That may be, but I think the jury
9 itself has asked a question in that fashion and I don't
10 think the Court is directing the verdict; I think the jury
11 is seeking an answer to a legal question, and the answer
12 is as I submit it is, that I have given to the Court.

13 If the result of that is that the jury finds
14 the defendant guilty, that is no more than it should be
15 under the law.

16 MR. KRIEGER: Your Honor, the position of the
17 defendant is as it already has been stated in the charge
18 discussion, the exceptions taken to the charge, and the
19 arguments thereon, both before and after the charge, and I
20 most respectfully suggest to the Court that if there is
21 error in the Court's charge in proceeding under the theories
22 as espoused by the government, I think it would be aggravated
23 by changing the language of the charge as already given.

24 THE COURT: Mr. Krieger, that doesn't concern
25 me. If there is error in my charge, there is error in the

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2 charge. That's not what is concerning me at all.

3 The point is that I don't want to be in a
4 position, as you have indicated earlier, of taking the
5 fact-finding from these people.

6 MR. KRIEGER: Yes, of course, your Honor.

7 THE COURT: It may well be that the way out is
8 to read what constitutes the first element of Count One,
9 which begins at the bottom of page 30 and into what I have
10 as page 41, about eleven pages.

11 MR. BUSH: Might we have a few minutes to look
12 at that, your Honor?

13 THE COURT: Where I would begin is:

14 "With respect to the first element, receipt of
15 substantial unreported income."

16 MR. KRIEGER: On what page is that, your Honor?

17 THE COURT: After I set out the first three
18 elements, the last sentence on that page.

19 MR. KRIEGER: I have it.

20 THE COURT: Begin there, and read onto the
21 close, which indicates what is substantial unreported
22 income.

23 MR. KRIEGER: If the Court please, under
24 circumstances as they exist as of this moment, I think that
25 this is probably the best way to handle the situation.

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2 THE COURT: I do, too. I sort of feel that
3 is the way to do it. That ought to answer the question,
4 because the substance of the fact that the unreported income
5 that they can use and so forth doesn't have to come from
6 heroin.

7 I think it's there, it is in that charge, but
8 I am not saying it anymore directly than I did before. I
9 suppose that's my problem.

10 MR. KRIEGER: If the Court please, may the
11 record reflect that the defendant's exception to that portion
12 of your Honor's charge is continued.

13 MR. BUSH: If the Court please, without belabor-
14 ing the point, and I hope the Court won't think I am, but
15 it seems to me that the jury has a specific question for
16 which there is a legal answer, and at least to my knowledge
17 the law is such under the expenditures method that they
18 need not find beyond a reasonable doubt any particular source
19 of income.

20 If the law were otherwise, then the government
21 would always be put to the task of proving a specific items
22 case, which is not the law, as I understand it to be.

23 So it seems to me, then, that the answer really
24 is that while the government has obviously offered proof
25 to the jury as to a plausible source of this income, that

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2 source being the heroin transactions, that it need not find
3 beyond a reasonable doubt that that be the source, as long
4 as they are convinced.

5 THE COURT: Well, you're pressing that point and
6 if you will give me the case law to back that up, Second
7 Circuit case law to back that up, then maybe I might do it.

8 MR. BUSH: If the Court will give me a moment.
9 I do not have a specific answer, but I do have a book back
10 in my office which I believe I will be able to cite specific
11 cases to the court, to the effect that under the expenditures
12 method there need not be any --

13 THE COURT: All right, I will give you that much
14 time, but bring them along with you.

15 MR. BUSH: All right.

16 THE COURT: Okay, how long is that going to take
17 you, Mr. Bush?

18 MR. BUSH: Well, to be frank, I have a source
19 book that cites cases. If the answer is in there, I would
20 expect to find it very quickly. If it is not, then I
21 think I should just the Court I cannot find it quickly.

22 THE COURT: I will take a recess and I will give
23 you time to go back and find it.

24 MR. BUSH: Very well. Thank you.
25

2 THE COURT: All right, I have read the cases
3 and it is clear that -- at least my understanding is clear;
4 I don't know how clear actually it is -- that under the
5 expenditures theory the Government is showing the excess
6 of income over expenditures and evidencing or negating that
7 this has come from any non-taxable source, that the jury
8 is not bound by the fact that it suggests as a likely
9 source one particular source of the funds.

10 I am convinced that had the Government brought
11 this indictment and had stopped on the last line of Count 1
12 "by United States of America" -- period -- I wouldn't have
13 had any problem with this because at that point they would
14 have indicated that it is unreported income.

15 I am just not sure whether or not these last
16 lines put this case in any different posture by virtue of
17 the fact that they are in the indictment.

18 I think what I am going to do is to read a
19 portion of my charge on the expenditures theory and let it
20 go at that time. I think that is better. I think I
21 will feel better with it.

22 The next thing, they want the transcript of
23 the entire testimony of a witness, Henry Medina. I don't
24 know who that is. Who is that?

25 MR. BUSH: Henry Medina was the individual who

1 ks2

2 testified for the Government with respect to the investment
3 that was made by defendant into Sundrop Products Company,
4 a company which he owned or was one of the owners of.

5 THE COURT: If you gentlemen agree on it, why
6 don't you get it to the Court Reporter so he can be prepared
7 to read it. They want his entire testimony.

8 MR. BUSH: Might I at least submit to the
9 Court a proposed instruction that I believe does capture
10 the law? I have one word to add to it.

11 THE COURT: All right.

12 MR. BUSH: It is just a two-page proposed
13 instruction that I have written out.

14 THE COURT: Show this to Mr. Krieger, Mr. Bush.
15 What pages are they?

16 MR. KRIEGER: We still haven't found it, your
17 Honor. I think it is in the first volume of testimony.

18 MR. KELLEHER: 225, and it ends --

19 THE COURT: It is not very long either.

20 All right, Mr. Krieger, why don't you read that?

21 MR. KELLEHER: -- 236, your Honor.

22 THE COURT: Read that, and before I call the
23 jury in see if you have any difficulty with it. I am sure
24 you do.

25 MR. KRIEGER: I do. As far as I read, I see

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nothing in this which would make me back away or convince me that I should back away from what I originally suggested to the Court, that the Court restrict its supplementary charge to that portion which it had already indicated, beginning on or about the bottom of page 30 of its original charge.

I think that this changes the theory of the case as stated in the indictment, your Honor, and that is the problem with it.

MR. BUSH: If the Court please, I believe in any expenditures case I have seen there has always been stated a possible or a likely source of the income in the indictment, but I don't believe that that has ever been construed to bind the Government to that particular likely source.

THE COURT: Well, I am not sure, but I gather that is so from the cases I have read.

The statement which you have just indicated is probably a little bit more direct than the statement of what I really said in my charge. I don't think it is inconsistent with anything I have said in my charge. I suppose the objection to it is that it says it directly, it makes a direct point.

As a matter of fact, on page 34:

1 ks4
2 "In other words, under this theory, if
3 expenditures, however made, in a given year are
4 substantially over and above reported income and
5 all non-taxable items, an inference is permitted,
6 absent a satisfactory explanation, that the un-
7 accounted difference or balance is unreported
8 taxable income for the year in question."

9 MR. DUSH: If the Court would please, in the
10 Ford case, in Footnote 12 it says that the Court -- let me
11 just read to you what I believe to be the salient portions
12 of this case.

13 Footnote 12 reads:

14 "We do not overlook the fact that the Judge
15 charge that to convict, the jury must find that the
16 defendant actually received graft. In this respect
17 we think the charge was too favorable to the defendant."

18 In the Ford case apparently the allegation was
19 that while it was a net worth or expenditures case, that
20 the unreported income came from graft, one sort or another,
21 and the Court actually charged to that effect, and yet in
22 a specific footnote the Second Circuit said that was too
23 favorable to the defendant and not a necessary part of the
24 charge.

25 MR. KRIEGER: That is the Ford case because

1 ks5

2 the indictment almost unquestionably stopped at the point
3 the Court indicated.

4 THE COURT: Did you give me a copy of that?
5 I didn't see that.

6 MR. BUSH: I gave you a copy of that.

7 THE COURT: Who wrote that opinion? Is that
8 Judge Hincks?

9 MR. KRIEGER: Written by Judge Hincks.

10 THE COURT: In '56?

11 MR. KRIEGER: In '56.

12 THE COURT: I read that. But I didn't read
13 that footnote, though.

14 MR. BUSH: Let me give you the Court case.
15 It is on page 65, I believe.

16 MR. KRIEGER: I merely wish to point out, if
17 the Court please, that was a net worth case, that it wasn't
18 a specific item case, spelled out in the indictment as
19 this indictment does.

20 THE COURT: The problem that I have is with
21 semantics. I don't really see where the part of the
22 charge I have read to you is any different from, as a
23 matter of fact, the one that you have just proposed.

24 MR. BUSH: I am not sure that the totality of
25 the charge is, if the Court please.

1 ks6
2 THE COURT: I know, the totality of the charge
3 may not be, but certainly that part of it is.

4 MR. BUSH: The reason for my position and the
5 proposed instruction to the jury is that I think the jury
6 had a very specific question, and on that question the law
7 provides a specific answer, at least as I read the cases,
8 and we would be entitled to a charge that they need not
9 find any particular source of income.

2 10 THE COURT: All right, let me see that again.

11 (Pause.)

12 THE COURT: All right, get the jury.

13 (Jury present at 4.00 p.m.)

14 THE COURT: Ladies and gentlemen, there are two
15 pending requests and I will deal with the last one first,
16 and that is you wanted to have read to you the testimony
17 of Mr. Medina, his entire testimony, and the reporter can
18 do that now.

19 (Testimony of witness Medina read to
20 the jury.)

21 THE COURT: The other question pending is that
22 you asked, as I read it:

23 "Please, may we have an answer to: Is it
24 sufficient evidence of guilt that the defendant spent
25 moneys in 1967 in excess of reported income regardless

1 of the source of that income, presuming his net
2 worth was as stated in the 1966 statement of net
3 worth, or did that income have to come from the
4 heroin trafficking?"
5

6 Well, first I think I will repeat what I told
7 you before, that the only purpose of admitting the evidence
8 about narcotics trafficking, that that was received for
9 the very limited purpose to permit the Government to offer
10 proof of an alleged source of income.

11 The defendant is not on trial for that here.
12 That is not what he is here for.

13 The only purpose of that was to allow the
14 Government to present evidence that this was the source
15 of income, and the Government has proceeded under two
16 theories, one the expenditure theory and the other is a
17 theory as to the specific source.

18 Under the expenditure theory, the Government
19 proposed to you that a likely source of the income was
20 narcotics trafficking, but the Government need not prove
21 that the expenditures necessarily came from a particular
22 source. If you are convinced that the Government has
23 negatived or negated all plausible non-taxable sources
24 of income, then in order to convict the defendant under
25 the expenditure theory method you need not find that he

made his income from any particular source.

All right.

THE FORELADY: Thank you, your Honor.

(Jury left the courtroom at 4.15 p.m.)

MR. KRIEGER: If the Court please, may the record reflect my continuing exception, predicated upon the theories previously urged.

THE COURT: I understand. I think you ought to make your objection clear to this right now because you have made a objection to the charge as originally posed, but I think that in view of the fact that I have given this, I think you ought to make clear that you object to it.

MR. KRIEGER: I should state my grounds?

THE COURT: I think for your purposes I would prefer for the record to be clear that you are specifically objecting to this.

MR. KRIEGER: Yes, I am specifically objecting and the theory is in this whole Stirone argument that we have been urging upon the Court that the specificity of the indictment sets forth only one way in which this case can be proved and no other way, that the Government must prove beyond a reasonable doubt that the defendant understated his income, said income should have reflected the profit allegedly obtained from trafficking in narcotics,

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and the whole expenditures theory as proposed by the
Government is beyond the scope of the indictment.

THE COURT: And that the jury would have to find
that it came from that source in order to convict, from the
heroin trafficking, in order to convict as the indictment
is presently framed, is that your position?

MR. KRIEGER: Yes.

THE COURT: All right.

(Recess.)

T2 pm

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(5.15 p.m.)

(Jury not present.)

THE COURT: I have a note and I decided I would come down. They are saying:

"We cannot come to a unanimous conclusion. We have tried very hard. Your counsel would be appreciated."

(Note marked Court's Exhibit 6.)

THE COURT: My view is that they haven't really been deliberating long enough to have reached any conclusion that they cannot agree, and that they need to start deliberating some more. It is too early for that.

MR. BUSH: I agree.

MR. KRIEGER: As an alternative, your Honor, would you consider perhaps letting them go home now and come back tomorrow?

THE COURT: No, it's too early.

MR. KRIEGER: I'm just making inquiry.

(Jury present.)

THE COURT: Ladies and gentlemen, I have your note in which you ask for my counsel, that you can't come to a unanimous conclusion, that you have tried very hard.

I want you to recall the fact that this trial

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actually took, in terms of space, four weeks, and I think
12 actual trial days.

You have been deliberating, I think, only since
roughly about noon, and it is now about 25 after five.

When you sent me that note it was just about
five o'clock. And part of that time I gather you had
lunch.

So that it doesn't appear to me that you have
been deliberating long enough to have reached a conclusion
that you can't agree, and the whole purpose of your deliber-
ating is to talk among yourselves, and in some instances
it may not take much time, in others it may. I think that
what you have to do is realize that you have to talk it
out and continue with your deliberations, so I am going to
ask you to go back and continue your deliberations.

(Jury retired at 5.25 p.m.)

THE COURT: I don't propose to keep them here
till way into the night, but I am going to have them stay
for a couple of more hours before I let them go.

(Recess.)

Take 3 p.m.

1 jklt 1

2 (6:10 p.m.)

3 (In open court - jury not present.)

4 (Court's Exhibit 7 marked.)

5 THE COURT: I have a note from the jury which
6 reads as follows:

7 "One juror in our group feels that the courtroom
8 atmosphere in the entire court was hostile at all times to
9 the defendant's cause of action; therefore we cannot really
10 ever come to a unanimous conclusion since that juror feels
11 a fair trial has not taken place here. Doesn't this mean
12 that we are impossibly locked and unable to give a verdict?"

13 Bring them in, please.

14 (Jury present.)

15 THE COURT: I have your note and I have read it
16 to counsel.

17 There is a great deal in it, ladies and gentle-
18 men, and there is apparently some misunderstanding. I have
19 much that I am going to answer in regard to this, but it
20 appears to me that all of us, you and I and counsel, have had
21 a full day.

22 I want you to go home and sleep over this, and
23 I will be here the first thing tomorrow morning at 10
24 o'clock at which time I will respond fully to this note.

25 So that you may be excused for the night, and

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2 you will resume your deliberations at 10 o'clock tomorrow
3 morning.

4 (Jury left the courtroom.)

5 THE COURT: All right, we will adjourn until
6 tomorrow.

7 (Adjourned to March 2, 1976 at 10 a.m.)
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2 UNITED STATES OF AMERICA

3 vs.

74 Cr. 421

4 BENJAMIN RODRIGUEZ.

5

6

New York, March 2, 1976;
10.00 o'clock a.m.

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(Open court; jury not present.)

10

THE COURT: Okay, get the jury.

11

MR. KRIEGER: If your Honor please, I would

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respectfully except to the proposed requests of the Govern-

13

ment as I feel that they are not addressed to the issues

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which have been presented by the jury's note, Court Exhibit

15

No. 7.

16

THE COURT: What do you suggest that the jury's

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note presents, Mr. Krieger?

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MR. KRIEGER: Your Honor, I think what the

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Government has done here --

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THE COURT: I didn't ask you that. I asked

21

you what do you think the jury's note presents?

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MR. KRIEGER: If the Court please, I read the

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jury's note as being a bit deeper than just it simply

24

appears to state.

25

I don't think that this jury is saying, " I am

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2 angry at the Judge" or "I am angry at the prosecutor."
3 I think that this juror may well have picked up, for
4 instance, a portion of the Court's charge referring to the
5 Government's responsibility to negate investigative leads
6 as an example. The juror may have picked up, in the
7 ambience of the courtroom, the fact that the Government's
8 witnesses are biased and have been biased by activities of
9 the Government.

10 The juror may have picked up the feeling that
11 the defense witnesses have been unfairly interrogated,
12 approached or handled by the Government and therefore that
13 juror feels that it cannot, he or she cannot come to a
14 determination of guilt.

15 I think that this juror is referring to the
16 fact finding process, that the juror is not referring to
17 just merely emotional responses.

18 The juror -- and for all we know, there may be
19 a reference contained herein to more than one juror -- the
20 juror may be referring to the entire credibility test
21 which the juror is to employ in assessing the evidence.

22 This Court properly instructed the jury that
23 "You are to use your conscience in evaluating the credibil-
24 ity of the witnesses."

25 Now, we all know that a trial is not conducted

1
2 in a vacuum and that the jury is to take into consideration
3 all which it sees before it, and if the jury, because it
4 has taken into consideration all of which it has seen before
5 it and has weighed those factors in the evaluation of the
6 entire testimony and has come to the conclusion that the
7 Government's case is infected with a hostility against the
8 defendant, and therefore has a reasonable doubt, that
9 juror's opinion is to be respected, once again assuming
10 that it is only one juror.

11 I do not think, if the Court please, that what
12 is contained in this note, I repeat, is a mere emotional
13 reaction saying that the Judge was harsh. I don't think
14 that is it at all, and that is basically the predicate for
15 my objection to an Allen charge and the supplemental
16 request.

17 I further state to the Court I have submitted
18 no request, your Honor, because I frankly can't see a
19 way out of this morass. I think it was created by the
20 Government and the Government must bear the responsibility
21 for it.

22 THE COURT: All right, Mr. Krieger, thank you
23 very much.

24 MR. KRIEGER: You're welcome.

25 THE COURT: Get the jury, please.

(Jury present.)

THE COURT: Good morning, ladies and gentlemen.

I sent you home last night and deferred until today to respond to your note because you had had a full day yesterday and I wanted all of you to be rested and clearheaded so that you could absorb fully my comments.

Now, each of you took an oath when you sat down in that jury box to truly try this case, based on the evidence and on the law as I gave it to you and stated it to you.

Each of you took the oath that you did not sit in that jury box with some hidden, unrevealed personal agenda which you would attempt to pursue.

Now, your obligation and responsibility as jurors is to decide the facts, based on the evidence, solely on the evidence you heard in this courtroom, and on the law as I state it to you.

If you fail or refuse to do that, you have corrupted your oath and the legal process, and you cannot escape that result, let me suggest to you, by throwing the responsibility on someone else's shoulders.

Now, as I understand, the essence of the complaint is that a juror feels that the defendant, in the atmosphere in this courtroom, did not obtain a fair trial.

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2 In the courtroom and in court trials there is
3 a ritual and each of us in this ritual has a function,
4 counsel, the Court and the jury.

5 A trial is an adversary proceeding, and counsel
6 are engaged in a contest of skills, and at times that
7 contest becomes heated. It has occurred; you have
8 noticed that at some point in this trial.

9 The function of the court is, one, to maintain
10 order and to be sure that the trial process proceeds in
11 an atmosphere where there can be a rational and fair trial.

12 In the first instance, the ultimate respon-
13 sibility of the Court is to insure that there is a fair
14 trial. That is not the responsibility of the jury. The
15 jury's responsibility is to decide the facts based on the
16 evidence.

17 My function is not to invade your responsibility
18 and to decide the facts for you. That is your job.
19 But my job is to insure in the first instance that this
20 trial proceeded in accordance with the rules of law in
21 respect to fairness.

22 In doing that, ladies and gentlemen, I have to
23 rule on various motions. I have to rule on objections.
24 I have to make rulings as I understand the law to be.

25 I believe that in the course of this trial

1 jks
2 there have been a number of times when motions for a
3 mistrial were made, and I have in every instance overruled
4 those motions because I am convinced that as a matter of
5 law there was no unfairness in this trial.

6 You have no more right as a juror to overrule
7 and oversee me in that regard than I have to oversee your
8 finding of the facts. That is what the legal process is
9 for. That is what it is all about.

10 I am here to attempt to interpret the law as
11 I understand it, and if an atmosphere in this courtroom
12 has been created so there is unfairness to a defendant in
13 a case before me, and if the jurors follows its function
14 and applies the law to the facts that defines it and comes
15 back with a verdict of acquittal, then at that point the
16 defendant obviously, even though he has been affected by it
17 hasn't been adversely affected.

18 On the other hand, if the jury comes back and
19 applies the law to the facts and comes back with a con-
20 viction, if the atmosphere is such that there was unfair-
21 ness, the case isn't over. That is what Appellate Courts
22 are for. The Appellate Courts are here to supervise
23 and to oversee me, the Court, and to be certain that errors
24 of law do not creep in, and therefore no one is unduly and
25 unfairly punished because the judge, either by personal

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2 prejudices or by whatever way, has made errors in the law.

3 But again, that is not the function of the
4 jury. That is the function of the Appellate Court in the
5 event that the facts and the application of the facts lead
6 to a conviction. If it doesn't, then there is something
7 else. Then we are through with it. But if it leads to
8 a conviction, then the case isn't over. The Appellate
9 Courts are there to look at this case and to oversee it
10 and to make rulings in regard to it, in regard to the fact
11 whether or not there were errors in the law.

12 We have to make certain that we all understand
13 what our oath is and what our function is in this process.
14 It is quite possible that as a Federal judge in the Federal
15 Court that I could comment on the evidence and I could
16 indicate to you -- and it would be within the rules -- as
17 to each one of these witnesses, by virtue of my commenting
18 on the evidence, I could give you some indication of how
19 I felt about the facts. But I never do that and don't
20 propose to do that because even though I am allowed to do
21 it, it would be invading your function.

22 Now, what I want you to do is that you stick
23 to your function, you follow your oath, you fulfil your
24 responsibility, and don't you invade my responsibility
25 or my function or the Court's function.

1
2 I applaud the concern of the juror or jurors
3 who are concerned that our courts function and operate
4 in a way that there be fairness in the trial, but I want to
5 assure you that the way to do that and to insure fairness
6 is not for you to violate your oath. Even assuming
7 that you are correct, that somehow the Court didn't fulfil
8 its function in regard to the supervision of this trial,
9 the old saying is that two wrongs can't make a right;
10 you can't correct it by corrupting your oath. Your
11 responsibility is not to violate your oath.

12 Now, let me say one more thing, then I will move
13 on.

14 We all have a purpose, and the jurors have a
15 purpose, and the jurors are picked as lay people because
16 their role is to concern themselves solely with the facts
17 and to take the law as the Court gives it to them. Counsel
18 and the Court have had a lifetime of training in the law.
19 None of you sitting there can make any rational decision as
20 to whether or not a judgment or a motion or a ruling of
21 the Court on a matter of law was correct or not because
22 you are uninformed. You don't know what that is. Many
23 of you are in some profession of some kind, but I am not
24 a trained doctor or an engineer or an architect so that I
25 would be able to therefore tell you, those of you who

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are in that field, what your business is. I have to accept the fact that you know what your business is, and you are going to have to do that insofar as the Court is concerned

I am going to suggest that you continue your deliberations, and I am going to suggest, as I indicated to you before, the purpose of jury deliberations is to talk things out.

When you first sat down I said to you I wanted you to listen to all the evidence and to keep an open mind and that you are to be hardheaded and make a hardheaded analysis of the facts without favor or prejudice, but based on your view of what the facts require, based upon the instructions that I have given you.

Now, the case is an important case, as I told you before, both to the Government and to the defense, and it is desirable that if a verdict can be reached that it be done, and that is so both from the point of view of the defendant and from the point of view of the Government.

As I understand this note -- I can't read between the lines of the note, but as I understand this note -- maybe I have misjudged it -- the import of the note, as I received it, is that the juror has reached a conclusion that he or she cannot exchange views or deliberate about the

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2 facts and will not reach any conclusion about the facts
3 for the reasons I have stated, and they are not, let me
4 suggest, sound reasons.

5 Your final vote must reflect your conscientious
6 decision as to how the issues are to be decided. But that
7 conscientious decision must be based upon the evidence in
8 this courtroom and upon the law as I stated it to you.
9 If you follow that process and apply it, then obviously you
10 are not to yield your convictions simply because you happen
11 to be outnumbered and outweighed.

12 This trial, as I told you yesterday, took some
13 12 days. It was spread out over a period of four weeks.
14 The fact issues have been sharply delineated. The trial
15 has been expensive, and if you should fail to agree on a
16 verdict, the case is left open and undecided, and like all
17 cases it must be disposed of at some time, and there
18 appears to be absolutely no reason to believe that another
19 trial would not be equally expensive, nor does there appear
20 to be any reason to believe that the case can be tried
21 again more expertly or more exhaustively or more earnestly
22 than it has been on either side.

23 Any future jury must be selected in the same
24 manner as you were and must be chosen from the source that
25 you were chosen from, so there doesn't appear to be any

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2 reason to believe that the case would ever be submitted
3 to 12 jurors who are more intelligent, more impartial or
4 more competent to decide this case or that more or clearer
5 evidence could be produced on behalf of either side.

6 A trial of a case represents enormous energy,
7 but that energy has gone primarily into an expenditure
8 before the trial. A trial is like surgery. The patient
9 has been treated with deep therapy by the application of
10 drugs and all kinds of remedies short of surgery itself,
11 and surgery may take a couple of hours, but does that make
12 it less important in the whole process? Of course not.

13 This case has taken 12 days, but there has
14 been a great deal of time and effort before this case came
15 into this courtroom that was expended by lawyers, by lawyers
16 for the Government and for the defense before we even
17 reached this point.

18 Now, while undoubtedly the verdict of the jury
19 should represent the opinion of each individual juror, it
20 by no means follows that opinions may not be changed by
21 conference in the jury room.

22 The very object and purpose of the jury system
23 is to secure unanimity by comparison of views and by argu-
24 ment among the jurors themselves.

25 It is normal, perfectly normal, absolutely

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2 normal for the jurors to have differences, and frequently
3 jurors, after extended discussion, may find that a point
4 of view which originally represented a fair and considered
5 judgment might well yield upon the basis of argument and
6 upon the basis of further discussions and a further view of
7 the facts and the evidence.

8 Now, frequently further consideration may
9 indicate that a change of original attitude is fully justi-
10 fied upon the law and the facts.

11 Now listen to what the Supreme Court of the
12 United States has said on this and I am now quoting:

13 "Although the verdict must be the verdict of
14 each individual juror, they should listen with a
15 disposition to be convinced by each other's argument,
16 that if the much larger number were for conviction,
17 a dissenting juror should consider whether his doubt
18 was a reasonable one which made no impression upon
19 the minds of some men equally honest, equally
20 intelligent as himself. If, upon the other hand,
21 the majority were for acquittal, the minority ought
22 to ask themselves whether they might not reasonably
23 doubt the correctness of the judgment which was not
24 concurred in by the majority."

25 Now, it cannot be that each juror should go

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into the jury room with a blind determination that the verdict shall represent his or her opinion of the case at the particular time or that he should close his ears to the argument of men and women who are equally honest and intelligent as himself or herself and who bear the same responsibility, serve under the same sanction of the same oath and heard the same evidence with, we may assume, the same attention and with an equal desire to arrive at a fair and honest determination.

Now remember that at all times no juror is expected to yield a conscientious conviction that she or he may have as to the weight or effect of the evidence, but remember also that after full deliberation and a consideration of all the evidence it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience.

Now, consequently, I am going to ask you to retire to the jury room and to continue your deliberations. Carefully reexamine and reconsider all the evidence bearing upon the questions before you. And that consideration, ladies and gentlemen, is to be limited, as your oath bound you to, to an evaluation of the evidence and a determination of the facts based upon the law as I have stated it to you.

All right, thank you.

2 (Jury retired at 10.30 o'clock a.m.)

3 MR. KRIEGER: Your Honor, I believe that I have
4 a few things which I would like to spread on the record at
5 this point.

6 THE COURT: Sure.

7 MR. KRIEGER: Thank you.

8 If your Honor please, number one, I take
9 respectful exception to the entire supplemental instruction
10 as not being responsive, number one, to the note sent by the
11 jury, Court's Exhibit No. 7, and number two, has intro-
12 duced into this case matters that should not be presented
13 to the jury as, for instance, the explanation of the Court
14 for its decisions on motions for mistrial, as an example;
15 the description to the jury of the functions of the various
16 parties; the fact that the adversary system is merely a
17 contest of skills and that the responsibility for a fair
18 trial rests solely with the Court.

19 I further take exception to the introduction
20 before this jury of a contention that there are hidden
21 personal views when there is no basis therefor, and the
22 the use of the term that a juror would be corrupting his
23 or her oath in adhering to the position as exemplified in
24 Court's Exhibit No. 7.

25 I would further take respectful exception to the

2 portion of the Court's supplemental instruction referring
3 to the existence of the Court of Appeals and the function
4 of the Court of Appeals --

5 THE COURT: Well, Mr. Krieger, I think you have
6 said enough to protect yourself on the record.

7 MR. KRIEGER: I am fearful, your Honor -- I am
8 very candid to state, your Honor, that --

9 THE COURT: As a matter of fact, you except
10 to the whole supplementary charge and I think you are
11 protected on the record.

12 MR. KRIEGER: May I add one other thing with
13 the Court's permission?

14 I would respectfully ask the Court for a hearing
15 under the authority of United States against Dozier, 522 F.
16 2nd 224, Second circuit decision of very recent date,
17 where in circumstances where it was indicated that a juror
18 felt that the decision was in God's hands, and the Court
19 eventually charged, et cetera, a verdict was rendered, which
20 is an exaggeration of what may or may not be taking place,
21 the Court of Appeals said:

22 "We would have been inclined to remand for a
23 hearing had trial counsel requested such an examin-
24 ation after the verdict had been rendered, moved for
25 a mistrial or objected to the trial Court's supple-

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2 mental instruction. Indeed, had a hearing been
3 requested at that time it would have been improper
4 not to hold one."

5 That is at page 228 of that decision.

6 I am therefore moving for a hearing, your Honor,
7 to be conducted at some convenient time, concerning the
8 matters which have surfaced as a result of Court's Exhibit
9 No. 7.

10 THE COURT: All right, Mr. Krieger, I am con-
11 vinced that that case has nothing to do with what has
12 transpired here, that what has transpired here is precisely
13 as I have indicated in my statement to the jury.

14 All right.

15 (Recess.)

16 (In open court, 11.45 o'clock a.m.; jury not
17 present.)

5 18 THE COURT: The jury wants to have the testimony
19 read of various people, and my deputy court clerk has it,
20 so that you can look at it, and he is going over it, getting
21 the page references, and when that is done I will call them
22 and read it to them.

23 I want to get some idea, though, before I do
24 call them, how extensive the reading is going to be.
25 I think they want about four or five witnesses, but I gather

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2 that they are for the most part on some phase of the
3 transactions.

4 MR. BUSH: I can get the pages very quickly.
5 I have my transcript marked by witnesses.

6 THE COURT: All right.

7 (Recess.)

8 (Open court; 12 o'clock noon; jury not
9 present.)

10 (Court's Exhibits 8 and 9 marked.)

11 THE COURT: All right, get the jury.

12 (Jury present.)

13 THE COURT: You have asked for the testimony
14 of Richard J. Delaney, Sr. of the European Bank & Trust
15 Company, and Mr. Hogg and Mr. Nierenberg, Mr. Pringle and
16 Mr. Gluck.

17 (Testimony of witnesses Delaney, Hogg,
18 Nierenberg, Pringle and Gluck read by the Reporter
19 to the jury.)

20 THE COURT: All right.

21 You may --

22 JUROR NO. 2: There's more -- the amounts.

23 MR. BUSH: If the Court please, I read the checks
24 to the jury after I finished.

25 THE COURT: You read the amounts of the checks.

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2 They are exhibits. If you want them, you may have
3 them.

4 THE FORELADY: Could we have those exhibits,
5 please?

6 MR. BUSH: The Franklin National Bank --

7 MR. KRIEGER: I would object to any colloquy
8 between the prosecutor and a member of the jury.

9 THE COURT: One of them said there was more,
10 because they wanted the amounts, and I assume they want
11 the exhibits before them.

12 THE FORELADY: Yes, Your Honor.

13 That was all we said, Mr. Krieger.

14 JUROR NO. 3: Also Exhibit 43.

15 THE COURT: Exhibit 43 and these other exhibits
16 is what is being requested now.

17 (The jury retired at 12.45 o'clock p.m.)

18 THE COURT: All right, Exhibit 43 and the
19 checks.

20 MR. BUSH: The bank checks are 53 and 53-A
21 through C, I believe.

22 43 is the Winnel receipts.

23 THE COURT: All right.

24 MR. KRIEGER: Your Honor, may we break for lunch
25 and leave for an hour or so?

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THE COURT: I guess so.

Let's adjourn.

(Luncheon recess.)

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2 (2.50 p.m., in open court, jury present.)

3 THE COURT: Ladies and gentlemen, you have
4 asked for -- frankly, I don't understand -- on February
5 12th, the cross-examination of the redirect by Mr. Krieger --
6 I gather of Mr. Osmer, and we gather than maybe what you
7 would want is the recross examination of Mr. Krieger.

8 THE FORELADY: Yes.

9 THE COURT: Now, that testimony covers some
10 70 or 80 pages. You have been here for 12 days. Now,
11 we really cannot reread all the testimony.

12 THE FORELADY: We really didn't want it all,
13 your Honor.

14 THE COURT: What I am going to suggest you do,
15 that if you need any part of any of the testimony and are
16 unclear on matters, then be more specific so that maybe
17 we can pick out some of the things that you want, but we
18 just can't sit here -- we have been here for 12 days -- we
19 can't sit here for 12 days and reread the testimony to you.

20 Now, if you go back and articulate more clearly
21 what it is in any part of the testimony and try to specify
22 what it is that you need to be clarified about, I will be
23 glad to give it to you.

24 But I would like for you to, both for yourself
25 and for us, for the rest of us, to be specific, what portions

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2 of it there is.

3 Mr. Osmer's testimony, ladies and gentlemen,
4 I think went from February 10th to February 12th. It went
5 for three days. So that if you will tell me, if you will
6 be more specific about what it is that you want, we will
7 try our best to pick out for you, but I would prefer for you
8 to do that.

9 If you can't do it any better, obviously we will
10 read the whole three-day testimony, if you want it, but
11 the point is I would like for you to think a little bit
12 more clearly about what you want and tell us, and I will
13 be glad to oblige.

14 All right.

15 (Jury retired at 2.55 p.m.)

16 THE COURT: All right, if you will excuse me,
17 again, gentlemen, I will go back to the preliminary
18 injunction hearing.

19 (Note marked Court's Exhibit 10.)

20 (Recess.)

21 (Jury not present; discussion off the
22 record.)

23 THE COURT: In answer to the jury's inquiry,
24 we will read from line 6, page 958, to the end of 959 and
25 we will read from 1044, line 7 to line 15, which is really

1 jks

2 the end of his testimony, on page 1047.

3 I am inclined at this point to find out what
4 else they want to know about the transaction because it is
5 not developed any place else.

6 MR. KRIEGER: I would respectfully ask the
7 Court to have read at least that portion of the witness'
8 testimony commencing on page 1060 through 1080, and would
9 respectfully except to the Court's decision not to have
10 such testimony read to the jury.

11 THE COURT: All right, I think what we will do
12 is as I suggested. If that doesn't cover the points that
13 they are interested in, then we will read some more, but
14 I can't see any relevance to the transaction in kilos.
15 Maybe that is what they want to hear, but they didn't frame
16 it like that. All of this stuff on page 1060 deals with
17 whether he made a telephone call to somebody before he
18 brought the kilos in. It has nothing to do with the
19 transaction.

20 MR. KRIEGER: My view, your Honor, is that it
21 has to do with the transaction.

22 Would you do this, please, your Honor?
23 Would you advise the jury when the reporter has finished
24 with page 1047 that that is the conclusion of the testimony
25 on February 17th and that --

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2 THE COURT: Is that the conclusion?

3 MR. KRIEGER: 1047 is the end of that day, and
4 that there was further cross on February 18th.

5 Is there something that they would want to hear
6 on that date, because they are the ones who bring up the
7 dates.

8 THE COURT: All right, that is true. That is
9 true. I think that is fair enough.

10 MR. BUSH: Your Honor, before we go beyond what
11 your Honor has indicated that you will read to them, if
12 your Honor is going to go further, if the jury indicates
13 they want to go further, I have some reservations about
14 omissions that Mr. Krieger would like your Honor to make
15 with respect to these telephone calls, because at the very
16 beginning of the second day's testimony of Mr. Pastou there
17 are questions beginning at 1057, 1058 and 1059, yet Mr.
18 Krieger wished to pick up at 1060. So, if in fact we go
19 further, I would ask the Court to hear me for just a moment
20 about what portions or total portions should be read to
21 the jury.

22 MR. KRIEGER: If your Honor is going to read
23 that area of the testimony, I would have no objection to
24 pages 1047 through 1060 being read.

25 As I indicated before, the reason I did not

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2 suggest them to the Court is that my recollection is that
3 I was asking about Alberto and I should been asking about
4 Alphonso.

5 MR. BUSH: And I would also object to saying to
6 the jury something to the effect that there is more testimony
7 the following day. I would just simply ask the Court
8 to instruct the jury that if they desire to have further
9 testimony read they can, of course, have it read.

10 THE COURT: Well, they say "During cross-
11 examination on 2/17 or 2/18 Pastou was questioned about
12 the first transaction of 21 and 9 kilos making a total of
13 30."

14 It seems to me that the question about the
15 30 kilos is picked up again on page 1076, that page.

2 16 I don't know whether tht is all they are refer-
17 ring to or not, but that is the next day.

18 There is a mention of 12/16, 30 kilos, and all
19 that is mentioned there is the fact that he brought those
20 kilos in. That's on the 18th, and it certainly appears
21 to me that ought to be read.

22 I really am having a hard time with this.

23 MR. BUSH: Might I suggest that we read the
24 pages the Court originally indicated, 1044 at line 7 to
25 1047 at line 15 and then ask the jury if they want to hear

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2 further testimony, it will, of course, be read to them,
3 once they specify what it is. But at this poin --

4 THE COURT: Well, I can ask them does that cover
5 what they want to hear or is there something else. It
6 certainly is difficult for me to ascertain what there is
7 on the 18th that has reference to this other than page
8 1076.

9 All right, get them, please.

10 (Jury present at 5.35 p.m.)

11 THE COURT: All right, ladies and gentlemen,
12 you have asked for some testimony from Pastou that on October
13 2, 1967, either \$3000 or \$6000 was unpaid but due, and I
14 have asked the Court Reporter to read what I believe is
15 that section of his testimony from line 6 on page 958 to
16 the end of 959.

17 You also asked that "During cross-examination
18 on 2/17 and 2/18 Pastou was questioned about the first
19 transaction of 21 and 9 kilos making a total of 30. Use
20 your own discretion as to how much to read."

21 I have asked the reporter to read from line 7
22 on 1044 to line 15 on 1047, which is the testimony on
23 2/17, referring, as far as I am able to ascertain, to the
24 30-kilo transaction.

25 If that doesn't cover what it is you want, or

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2 doesn't cover all that you want, then you will let me
3 know.

4 All right.

5 (Record read.)

6 THE COURT: Now, I suppose all I can ask you
7 is that what you wanted to hear? Do you want to hear
8 anything else?

9 THE FORELADY: That's fine.

10 THE COURT: All right. Thank you.

11 THE FORELADY: Your Honor --

12 THE COURT: What else?

13 THE FORELADY: Wasn't there some testimony
14 about 21 and 9 kilos also?

15 MR. BUSH: If the Court please, that was on
16 direct examination. I do have the pages. I don't
17 believe that was gone into on cross-examination.

18 THE COURT: You asked for cross about 30.

19 THE FORELADY: Is it possible for us to hear
20 that?

21 THE COURT: Yes. Well, I suppose you gentle-
22 men better agree what the pages are because I don't have
23 that.

24 MR. BUSH: Might I suggest --

25 THE COURT: Why don't you go over it with Mr.

1 jks

2 Krieger?

3 (Pause.)

4 THE COURT: We will start with line 7 on
5 page 933 to line 25 on page 939. That is to the end of
6 the page on page 939.

7 (Record read.)

8 THE COURT: That's it. That was the testimony
9 on the direct on the 21 and 9.

10 THE FORELADY: Do you want us ton continue
11 deliberating?

12 THE COURT: Yes, I do.

13 (Jury retired at 5.50 p.m.)

14 THE COURT: I have a note which I received from
15 the jury while I was in the other case and the answer to
16 which I indicated that I wanted them to continue to
17 deliberate, but I will read the document.

18 "Your Honor, we, the members of the jury, were
19 voting on the verdict since 2.30 yesterday when we
20 had ten guilty, one undecided and one not guilty."

21 I can't read that. There is one phrase I
22 can't read, but something on something.

23 Maybe it means "On a further ballot the undecided
24 shifted to guilty and the same juror still votes not
25 guilty. Apart from one juror feeling, first the evidence

1 jks

2 is insufficient for a verdict of guilty, this juror
3 continues to feel that the trial was conducted in an
4 atmosphere detrimental to the defendant's cause of
5 action. Accordingly we feel no further deliberations
6 would be fruitful."

7 I sent in word to them that I wanted them to
8 continue their deliberations after I received that note,
9 and I am going to persist in that.

10 MR. KRIEGER: Would your Honor indicate at
11 about what time that note was sent in, please?

12 THE COURT: I thought I had indicated that.
13 3.45.

14 MR. KRIEGER: Thank you.

15 (Court's Exhibits 11 and 12 marked.)

16 THE COURT: All right, gentlemen, I am going
17 upstairs to chambers.

18 (Recess.)
19
20
21
22
23
24
25

xx

Judge Carter
Take 2 p.m.
3/2/76

1

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2194

US. v. Rodriguez

(7p.m.)

3

(In open court-jury present.)

4

THE CLERK: Madam Forelady, has the jury agreed

5

upon a verdict?

6

THE FORELADY: Yes, sir.

7

THE CLERK: What is your verdict?

8

THE FORELADY: Guilty.

9

THE CLERK: Break it down into each count.

10

THE FORELADY: As to both counts.

11

THE CLERK: Thank you.

12

Members of the jury, you say you find the

13

defendant Benjamin Rodriguez guilty on both Counts One and

14

Two and so say you all.

15

MR. KRIEGER: Your Honor, may the jury be

16

polled, please?

17

THE COURT: Yes.

18

(Jury polled by the clerk and all responded in

19

the affirmative.)

20

THE COURT: All right, ladies and gentlemen,

21

I want to thank you for the kind of service that you have

22

rendered, and I know that to a number of you this has been

23

more than an inconvenience. It has been to some, I gather,

24

a sacrifice, but our system cannot work without the kinds

25

of sacrifices that have to be made in terms of jury duty.

1
2 I know this has been a very long trial for you,
3 and the process of reaching a determination has been long
4 as well, but that is the only way that our system can work.
5 I appreciate it. Thank you very much.

6 (Jury discharged.)

7 THE CLERK: Counsel, for the record, the jury
8 verdict will be marked as Court's Exhibit 14.

9 (Court's Exhibit 14 marked.)

10 MR. KRIEGER: If the Court please, may all motions
11 be reserved until the day of sentence?

12 THE COURT: I suppose so. I think it would
13 probably be more convenient for you, in any event. I would
14 modify it to this extent:

15 I would think that if you mean by that -- let
16 me start again.

17 MR. KRIEGER: May I interject something, your
18 Honor?

19 If I intend something other than just a pro
20 forma reiteration of the motions normally made orally,
21 that is one thing. If I intend to present a formal motion
22 upon affidavit and authority, then I would certainly feel
23 bound to serve that upon the Assistant United States
24 Attorney at least two weeks prior to the date the Court
25 fixes.

xxx

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1188

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN RODRIGUEZ,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, JOSEPH BEELER, hereby certify that I have served each party required to be served by placing two copies each of the Brief for Appellant and the Appendix for Appellant in a postage prepaid container and placing said container in a United States Mail receptacle in the United States Post Office, Los Gatos, California, addressed as follows:

ROBERT B. FISKE, JR.
United States Attorney
United States Courthouse
Foley Square
New York, New York 10007

DATED: June 11, 1976

Joseph Beeler